No. 95-1232-CSX Title: General Motors Corporation, Petitioner
v.
Roger W. Tracy, Tax Commissioner of Ohio

Docketed: February 1, 1996 Court: Supreme Court of Ohio

Entry	Date	Proceedings and Orders
	Dec 18 1995	Application (A95-527) to extend the time to file a petition for a writ of certiorari from January 2, 1996 to February 1, 1996, submitted to Justice Stevens.
	Dec 19 1995	Application (A95-527) granted by Justice Stevens extending the time to file until February 1, 1996.
	Feb 1 1996	Petition for writ of certiorari filed. (Response due March 2, 1996)
	Mar 1 1996	Brief of respondent Roger W. Tracy, Tax Commissioner of Ohio in opposition filed.
	Mar 4 1996	Motion of Committee on State Taxation for leave to file a brief as amicus curiae filed.
	Mar 4 1996	Brief amicus curiae of Enron Access Corporation filed.
	Mar 13 1996	DISTRIBUTED. March 29, 1996
	Mar 13 1996	Reply brief of petitioner General Motors Corporation filed.
	Apr 1 1996	Motion of Committee on State Taxation for leave to file a brief as amicus curiae GRANTED.
	Apr 1 1996	Petition GRANTED. SET FOR ARGUMENT October 7, 1996. **********
	May 16 1996	Brief amici curiae of Process Gas Consumers Group, et al. filed.
	May 16 1996	Joint appendix filed.
	May 16 1996	Brief of petitioner General Motors Corporation filed.
	May 16 1996	Brief amici curiae of Chamber of Commerce of the United States, et al. filed.
	May 23 1996	Order extending time to file brief of respondent on the merits until July 17, 1996.
	Jul 17 1996	Brief amicus curiae of Multistate Tax Commission filed.
	Jul 17 1996	Brief amicus curiae of National Association of Regulatory Utility Commissioners filed.
	Jul 17 1996	Brief amici curiae of Kansas, et al. filed.
	Jul 19 1996	Brief amicus curiae of Columbia Gas of Ohio, Inc. filed.
	Jul 23 1996	Brief of respondent Roger W. Tracy, Tax Commissioner of Ohio filed.
	Jul 24 1996	Record filed.
	Jul 29 1996	CIRCULATED.
	Jul 29 1996	Record filed.
	Aug 16 1996	Reply brief of petitioner General Motors Corporation filed.
	Oct 7 1996	ARGUED.
	Oct 7 1996	LODGING consisting of ten copies of October 1987 Opinion and Order of the PUC of Ohio, In re Application of the East Ohio Gas Company for Approval of Arrangements of Natural Gas Service, GCR Treatment and Pre-Granted Initiation and Termination Authority, Case No. 87-304-GA-AEC received from counsel for the petitioner and distributed.

2 pp

Entry	Date	Proceedings and Orders
	Oct 22 1996	Motion of respondent to strike petitioner's lodging filed.
	Oct 28 1996	DISTRIBUTED. November 1, 1996 (Page 22)
	Oct 28 1996	Opposition of petitioner to motion of respondent filed.
	Nov 4 1996	Motion of respondent to strike petitioner's lodging DENIED.

Supreme Court, U.S.
FILED

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No. 95 OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

GENERAL MOTORS CORPORATION,

Petitioner,

v.

ROGER W. TRACY, TAX COMMISSIONER OF OHIO,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Ohio

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does Ohio's use tax, which exempts gas purchased from local public utilities while taxing gas purchased out-of-State, discriminate against interstate commerce in violation of the Commerce Clause?

2. Does a purchaser of natural gas — which pays the use tax — have standing under the Commerce Clause to challenge such a use tax either in its own right or as a representative of vendors?

3. Does Ohio's discriminatory use tax violate the Equal Protection Clause?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the Ohio Supreme Court were General Motors Corporation and Roger W. Tracy, Tax Commissioner of Ohio.

Pursuant to Supreme Court Rule 29.6, Petitioner General Motors Corporation states that it has no parent companies. General Motors has several nonwholly owned subsidiaries, which are set forth in the Appendix at pages 29a-35a.

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PETITION FOR A WRIT OF CERTIORARI

General Motors Corporation ("GM") respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Ohio in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Ohio is reported at 652 N.E.2d 188. It is reprinted at pages 1a-5a of the appendix to this petition. The Orders of the Supreme Court of Ohio denying General Motors' petition for reconsideration are reported at 655 N.E.2d 188. They are reprinted at pages 26a-28a of the appendix to this petition. The relevant orders of the Ohio Board of Tax Appeals and Tax Commissioner of Ohio are also unreported. These orders are reprinted at pages 6a-19a and 20a-25a of the appendix to this petition.

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on August 9, 1995. A timely petition for reconsideration in that court was denied on October 4, 1995. On December 19, 1995, Justice Stevens extended the time for filing a petition for certiorari to and including February 1, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Commerce Clause of Article I, section 8 to the United States Constitution provides:

> The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

This case involves Commerce Clause and Equal Protection Clause challenges to Ohio's sales and use tax scheme, which exempts from tax natural gas purchased from Ohio-based public utilities but taxes purchases from out-of-State suppliers.

The Natural Gas Market. A purchaser of natural gas has essentially two choices of suppliers: producers or marketers of natural gas, or local distribution companies. Producers of natural gas, most of whom are concentrated in the southwestern United States, extract the gas from underground reservoirs;[1] marketers, as the name implies, market producers' gas. Local distribution companies are typically local public utilities, such as The East Ohio Gas Company or Columbia Gas of Ohio, Inc. I Tr. 97; II Tr. 67; II Tr. 75-76.[2]

Until the last dozen years, interstate pipeline companies and local public utilities were barred from serving as common carriers of natural gas for producers and marketers. II Tr. 158. As a consequence, producers almost never sold gas directly to consumers (the "burner-tip" market). II Tr. 17. Rather, producers' gas was most often sold in the first instance to interstate pipeline companies, who transported gas to public utilities which eventually sold the gas to the end user. *See* Breyer & MacAvoy, *The Natural Gas Shortage and the Regulation of Natural Gas Producers,* 86 Harv. L. Rev. 941, 944 (1973).

However, this prohibition on common carriage was lifted in the mid-1980s, first in Ohio as a partial solution to natural gas shortages, and later on the national level as part of the massive deregulation of the natural gas industry which occurred in the 1980s. II Tr. 17; II Tr. 140-41; *see generally* Pierce, *Natural*

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[1] *See* W. Fox, *Federal Regulation of Energy* § 15.02, at 424-25 (1983).

[2] References to "I Tr. ___" and "II Tr. ___" are to volumes I and II, respectively, of the transcript of record before the Ohio Board of Tax Appeals. References to "Supp. ___" are to the Supplement of record materials before the Ohio Supreme Court.

Gas Regulation, Deregulation, and Contracts, 68 Va. L. Rev. 63 (1982). These changes allowed producers and marketers of natural gas to compete directly with local public utilities for sales of natural gas to burner-tip consumers. II Tr. 158.

Since entering the burner-tip market, producers and marketers of natural gas have been enormously successful. This is principally because, even with transportation costs, producers and marketers are able to sell at lower costs than local public utilities. II Tr. 75; II Tr. 141. One marketer estimated that this manner of selling natural gas has grown from virtually zero in the early 1980s to "probably 80 or 90 percent of the gas that's consumed by industrial users" like GM. II Tr. 141.

General Motors' Activities. General Motors Corporation purchases natural gas used for power and heating purposes in its plants in Ohio. Since 1984, GM has bought natural gas directly from producers and marketers of natural gas outside of Ohio. II Tr. 59. During the tax period in issue (January 1, 1987 through June 30, 1990), GM's Ohio plants purchased most of their natural gas requirements directly from out-of-State producers or marketers rather than buying gas from the Ohio-based public utilities which served its Ohio plants. II Tr. 74. GM purchased from these out-of-State sources because they offered significantly lower prices than the in-State utilities. II Tr. 75; Supp. 202.

Under GM's contracts with the out-of-State sellers, GM acquired title to the gas at the point that the seller delivered the gas to the initial receiving pipeline; all of these delivery points were outside of Ohio. App. 1a. GM then contracted with interstate pipeline companies and local public utilities in Ohio for the transportation of the gas through pipelines to GM's plants as needed. *Id.*

The Ohio Statutory Scheme. The State of Ohio imposes a sales tax on goods purchased in Ohio, including natural gas. *See* Ohio Rev. Code Ann. § 5739.02. Similarly, that State imposes a use tax on goods, including natural gas, purchased outside of Ohio but used in Ohio. *See* Ohio Rev. Code Ann. § 5741.02(A). However, natural gas purchased from a "natural gas company" is

exempted. *See* Ohio Rev. Code Ann. § 5739.02(B)(7).[3] Under the Ohio code, "[a]ny person . . . [i]s a natural gas company when engaged in the business of supplying natural gas for lighting, power, or heating purposes to consumers within this state." Ohio Rev. Code Ann. § 5727.01(D)(4).

As discussed below, the Ohio Supreme Court in this case and in its recent decision in *Chrysler Corp. v. Tracy*, 652 N.E.2d 185 (Ohio 1995), has construed the Ohio Rev. Code Ann. § 5727.01(D)(4) definition of "natural gas company" to be limited to companies that "own or operate the transportation and distribution equipment and deliver the natural gas to consumers in Ohio." App. 3a. *See also Chrysler Corp. v. Tracy*, 652 N.E.2d at 187. In other words, only purchases from Ohio public utilities are exempt.

The Tax Commissioner's Assessment. For the audit period at issue here, the Ohio Tax Commissioner assessed Ohio use tax upon GM's purchases of natural gas, with a minor exception not relevant to this case. App. 24a.[4]

Proceedings Before The Board of Tax Appeals. GM appealed the Commissioner's final determinations to Ohio's Board of Tax Appeals ("BTA"). On February 25, 1994, the BTA affirmed the Commissioner's denial of the claimed exemption. App. 6a-19a

The BTA first held that GM's purchases were subject to tax under the statute. It held that the out-of-State "marketers and/or

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[3] Under Ohio law, sales and use tax does not apply to

> [s]ales of natural gas by a natural gas company . . . if [it] is delivered to consumers through . . . pipes, or conduits, . . . all terms as defined in section 5727.01 of the Revised Code.

Ohio Rev. Code Ann. § 5739.02(B)(7).

[4] That exception was for natural gas used at GM's plants for direct use in manufacturing, which is exempt from tax under Ohio Rev. Code Ann. § 5739.01(E)(2).

producers of gas" who sold the gas in question were not "natural gas companies" under Ohio Rev. Code Ann. § 5727.01. App. 10a, 13a. The BTA found "dispositive" its recent prior decision in *Chrysler Corp. v. Tracy*, B.T.A. Case No. 91-K-1523 (Jan. 21, 1994), in which the BTA

> concluded that a broker or marketer of natural gas, which did not produce natural gas, did not have the physical capabilities to transport natural gas to its customers, and which was not subject to regulation as a public utility, did not qualify as a "natural gas company" as that term is defined in R.C. 5727.01.

App. 13a (footnote omitted). Thus, under the BTA's construction of the statute, GM was not entitled to the use tax exemption because it was not purchasing its gas from a local public utility.

The BTA also rejected GM's "constitutional challenges with respect to the Tax Commissioner's application of a statute to a given set of facts," despite recognizing that under Ohio law the BTA "is without jurisdiction to determine the constitutional validity of a given statute." App. 15a. It concluded that GM had not shown that application of the statute to GM's practices was unconstitutional. App. 15a-16a.[5]

Proceedings Before The Ohio Supreme Court. GM appealed the BTA's decision to the Supreme Court of Ohio. In addition to again urging its statutory argument, GM argued that under the interpretation of "natural gas company" advanced by the Commissioner and adopted by the BTA, the use tax exemption was unconstitutional under the Commerce and Equal Protection Clauses. GM noted that the BTA's construction, which limited the definition of "natural gas companies" to companies having "the physical capabilities to transport natural gas to its cus-

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[5] Under Ohio law, "the BTA receives facts but cannot rule on the [constitutional] question[s]." *MCI Telecommunications Corp. v. Limbach*, 625 N.E.2d 597, 599 (Ohio), *cert. denied*, 115 S. Ct. 77 (1994).

tomers," effectively limited the exemption to purchases from local public utilities while taxing all out-of-state purchases. As a result of this unconstitutional discrimination, GM argued, it was deprived of the use tax exemption and paid higher taxes as a result.

The Ohio Supreme Court's Decision. On August 9, 1995, the Ohio Supreme Court handed down its decision. Following its affirmance of the BTA's decision in *Chrysler Corp. v. Tracy*, 652 N.E.2d 185, decided that same day, the court rejected GM's statutory argument on the ground that its vendors were not "natural gas companies" because they did not deliver gas to customers in Ohio. App. 2a, 3a.

The court also rejected GM's Commerce Clause argument on two grounds. First, the court saw no impermissible discrimination in exempting only Ohio public utilities, since independent marketers of gas within Ohio, like out-of-State sellers, were also subject to tax:

> We have before us purchases by GM of natural gas from a company that does not own any production, transportation, or distribution equipment. The commissioner claims that he would tax purchases from these persons whether they sold natural gas in-state or out-of-state. Thus, the commissioner's application of the statute does not benefit in-state purchasers by favoring in-state vendors over out-of-state vendors; he treats purchases from both the same.

App. 4a.

Second, the court held that "on close inspection," GM was arguing that the application of the exemption statute "burdens out-of-state vendors of natural gas." *Id.* However, the court held that GM "lacks standing" to make this claim because it was not "a member of that class" of out-of-State vendors. *Id.*

The supreme court also rejected GM's Equal Protection challenge, which it viewed as "submerged in [GM's] Commerce Clause argument." *Id.*

GM moved for reconsideration in the Ohio Supreme Court. Reconsideration was denied on October 4, 1995. App. 26a-28a.

REASONS FOR GRANTING THE WRIT

This case presents important questions concerning the constitutionality of state discrimination against out-of-State sellers of natural gas.

I. THE DECISION OF THE OHIO SUPREME COURT CONFLICTS WITH THIS COURT'S COMMERCE CLAUSE PRECEDENTS

An Ohio manufacturer wishing to purchase natural gas for use in his plant has two options: He can buy his natural gas requirements from a local public utility, or he can buy from a producer or marketer of natural gas. Ohio will allow him a tax exemption for his purchases — but only if he purchases the gas from a local public utility. If the purchase is not made locally, no exemption is available. Such parochial favoritism, endorsed by the Ohio Supreme Court, is completely inconsistent with the Commerce Clause.

The Ohio Supreme Court sought to justify this discrimination on two grounds, neither of which is sustainable.

A. The Ohio Supreme Court's Holding That The Tax Is Constitutional Because It Also Burdens Some In-State Purchases Conflicts With This Court's Decisions

In *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963), this Court held that when a State provides an exemption from sales tax, it must provide a strictly equal exemption from use tax for the same goods when purchased outside the State. *Id.* at 73. In taxing sales by out-of-State sellers marketing their products within the State, a State thus must follow a "strict rule of equality." *Id.* This "strict rule" means that States may not impose a *use* tax on out-of-State purchases which is greater than its *sales* tax on in-State sales. *Associated Indus. of Mo. v. Lohman*, 114 S. Ct. 1815, 1821 (1994). And even a small amount of discrimination against interstate commerce is

unconstitutional: This Court's cases "indicate that where discrimination is patent, as it is here, neither a widespread advantage to in-state interests nor a widespread disadvantage to out-of-state competitors need be shown." *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 276 (1988). In sustaining Ohio's lopsided exemption from sales and use tax, the Ohio Supreme Court heeded neither principle.

The principal justification which the Ohio Supreme Court offered for its decision was this: The Commissioner "treats in-state and out-of-state purchases from independent marketers of natural gas the same." App. 3a. In other words, because the exemption was denied for *some* in-State purchases as well as *all* out-of-State purchases, it was held to be constitutional. This Court's decisions, however, are uniformly to the contrary: A State may not save a tax from unconstitutionality simply because it favors only *some*, but not all, in-State commerce.

This principle has been established at least since *Brimmer v. Rebman*, 138 U.S. 78 (1891). That case addressed a Virginia statute that imposed special inspection fees on meat slaughtered more than 100 miles from the place of sale. This favoring of local commerce violated the Commerce Clause. Importantly, the Court explained, it was immaterial that the statute also disfavored some local commerce:

> The fees exacted, under the Virginia statute, for the inspection of beef, veal and mutton, the product of animals slaughtered one hundred miles or more from the place of sale, are, in reality, a tax; . . . . *Nor can this statute be brought into harmony with the Constitution by the circumstance that it purports to apply alike to the citizens of all the States, including Virginia*; for, "a burden imposed by a State upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the States, including the people of the State enacting such statute." *Minnesota v. Barber*, [136 U.S. 313, 326 (1890)]; *Robbins v. Shelby Taxing District*, 120 U.S. 489, 497 [(1887)].

Id. at 82-83 (emphasis added).

In the intervening century, the rule of *Brimmer* has consistently been recognized by this Court. *Dean Milk Co. v. City of Madison,* 340 U.S. 349 (1951), invalidated a Madison, Wisconsin ordinance which forbade the sale of milk in the city as "pasteurized" unless it had been pasteurized and bottled at an approved pasteurization plant "within a radius of five miles from the central portion of the City of Madison otherwise known as the Capitol Square." *Id.* at 350 & n.1. Like the statute at issue here, the Madison ordinance burdened *all* out-of-State product, and *some* in-State product. But that did not keep the ordinance from violating the Commerce Clause:

> It is immaterial that Wisconsin milk from outside the Madison area is subjected to the same proscription as that moving in interstate commerce.

Id. at 354 n.4.

Four Terms ago, this Court reaffirmed the rule of *Brimmer* in *Fort Gratiot Sanitary Landfill v. Michigan Department of Natural Resources,* 112 S. Ct. 2019 (1992). *Fort Gratiot* struck down a Michigan law prohibiting landfill operators from accepting solid waste originating outside the county of the landfill. Relying on the passage from *Brimmer* quoted above, and on *Dean Milk,* the Court held that Michigan's law, which favored only the small amount of in-State waste originating in the particular county, while disfavoring *all* out-of-State waste and *most* in-State waste, still violated the Commerce Clause. *Id.* at 2024-26.

And only two Terms ago, this Court applied the same rule to strike down a Clarkstown, New York, ordinance requiring all solid waste to be processed at that town's local transfer station before leaving the municipality. *C & A Carbone, Inc. v. Town of Clarkstown,* 114 S. Ct. 1677, 1682 (1994). Relying expressly on *Dean Milk* and *Fort Gratiot,* this Court held that "the flow control ordinance discriminates, for it allows only the favored operator to process waste that is within the limits of the town. The ordinance is no less discriminatory because in-state or in-town processors are also covered by the prohibition." *Id.*

This rule has repeatedly been applied in State tax cases which, like *Brimmer*, recognize the basic principle that a law which discriminates against out-of-State commerce, while favoring *some* in-State commerce, is invalid under the Commerce Clause even if it also disfavors some intrastate transactions. For example, in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), this Court considered a Hawaii sales tax which taxed all sales of liquor at wholesale, but exempted from the tax okolehao (a brandy produced from a root native only to Hawaii) and pineapple wine. Other locally produced liquors, such as "sake and fruit liqueurs [were] not exempted from the tax." *Id.* at 265. This Court held the discriminatory exemption violative of the Commerce Clause, despite the fact that the exemption was also denied to some in-State liquors. "[T]he effect of the exemption is clearly discriminatory, in that it applies only to locally produced beverages, even though it does not apply to all such products." *Id.* at 271. So too, the Ohio exemption "applies only to locally-[sold gas], even though it does not apply to all such products."

The decision below also conflicts with *Associated Industries of Missouri v. Lohman*, 114 S. Ct. 1815. There, the Court struck down Missouri's use-tax scheme, which allowed local governments to impose their own sales and use taxes on top of the State-imposed sales and use taxes. In some Missouri counties, but not in all, the combined State and local use tax on out-of-State sales exceeded the State and local sales tax on in-State sales. This was unconstitutional because it violated the "strict rule of equality" articulated in *Halliburton*, 373 U.S. at 73. It was immaterial to the Court's analysis that the discrimination was isolated in certain counties and not statewide, and that in many counties there was no discrimination against out-of-State purchases.

The same principle has been applied in the flat-tax cases. In *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266 (1987), this Court rejected Pennsylvania's argument that its flat axle tax on trucks, which placed a disparate burden upon out-of-State drivers (who in general would use Pennsylvania's roads only sporadically), could be saved from unconstitutionality because

some out-of-State trucks traveled more in Pennsylvania than some local trucks — *i.e., some* in-State commerce was burdened more than *some* out-of-State commerce. This Court acknowledged that this occurred on occasions, but nonetheless held the tax unconstitutional. *Id.* at 286-87.

The tax exemption scheme upheld by the Ohio Supreme Court causes similar distorting effects on the national market. Indeed, the Ohio scheme appears to be little more than a tariff on all gas not sold by a local public utility. But tariffs are *per se* forbidden by the Commerce Clause, because they "violate[ ] the principle of the unitary national market by handicapping out-of-state competitors, thus artificially encouraging in-state production even when the same goods could be produced at lower cost in other States." *West Lynn Creamery, Inc. v. Healy*, 114 S. Ct. 2205, 2211 (1994).

The favorable tax exemption, granted only to purchases from local public utilities, discriminates in favor of local commerce, and against the lower-priced gas available in interstate commerce. The decision of the court below, upholding this exemption scheme, results in a clear conflict with this Court's decisions.

B. The Ohio Supreme Court's Ruling On Standing Conflicts With Decisions Of This Court

The Ohio Supreme Court's second justification for its decision is equally untenable. That court appeared to hold that GM, the taxpayer, had no standing to challenge the tax under the Commerce Clause because "GM is not a member of that class" of "out-of-state vendors of natural gas." App. 4a. The supreme court reached this conclusion despite the fact that the Ohio use tax is imposed on consumers, such as GM. Ohio Rev. Code Ann. § 5741.02. This holding also conflicts with decisions of this Court.

This Court's decisions make clear that the Commerce Clause protects more than sellers; it also protects purchasers who wish to buy goods in an evenhanded national market. As Justice Jackson explained in the seminal case of *H.P. Hood & Sons, Inc.*

v. Du Mond, 336 U.S. 525 (1949), the Commerce Clause not only protects "every farmer" and "every craftsman"; it also protects "every consumer":

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them. Likewise, *every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any*. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.

Id. at 539 (emphasis added). *See also West Lynn Creamery*, 114 S. Ct. at 2218. The Commerce Clause protects the rights of all participants to "engage in commerce"; that clause confers "a freedom to trade with any State, to engage in commerce across all state boundaries." *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 335 (1977). Under the principles of these cases, a purchaser of out-of-State goods plainly has standing to challenge a discriminatory tax on Commerce Clause grounds.

The decision below also conflicts with this Court's specific holding in *Bacchus*. There, the State also urged that the petitioners lacked standing under the Commerce Clause. Petitioners were wholesalers of liquor who were obliged by State law to add the 20% excise tax to their sales price, to collect the tax, and to remit it to the authorities. *Bacchus*, 468 U.S. at 266. The Court held that the wholesalers had standing in part because "they must return the tax to the State." *Id.* at 267. GM, too, "must return the tax to the State"; that is enough for it to have standing to raise a Commerce Clause violation.

As this Court noted in *Bacchus*, "discrimination between in-state and out-of-state *goods* is as offensive to the Commerce Clause as discrimination between in-state and out-of-state *taxpayers*." *Id.* at 268 n.8 (emphasis added). When "goods" are

discriminated against, a buyer or potential buyer of those goods is just as damaged as a seller or potential seller.

The conflict between the decision below and the decisions of this Court is confirmed by two recent decisions of this Court which allowed in-State taxpayer-purchasers to bring Commerce Clause claims even though the "class" being discriminated against was the class of out-of-State sellers. In *Associated Industries*, where Missouri's use tax was at issue, one of the petitioners, Alumax Foils, Inc., was "a manufacturing firm in Missouri that pays the additional use tax on goods purchased from outside the State." 114 S.Ct. at 1819. Alumax and Associated Industries' Commerce Clause claim was successful; no "standing" problem with Alumax's claim was even adverted to by this Court. And in *West Lynn Creamery*, decided later that same Term, in-State milk *dealers* successfully brought a Commerce Clause challenge to a Massachusetts milk pricing order, even though the "class" being discriminated against was out-of-State milk *farmers*, from whom the in-State dealers purchased their raw milk supply. 114 S.Ct. at 2209. Again, no "standing" concerns were present.

Plainly GM in this case was raising its own Commerce Clause-protected "'right' to engage in interstate trade free from restrictive state regulation." *Dennis v. Higgins*, 498 U.S. 439, 448 (1991). The contrary decision of the court below conflicts with this Court's precedents and merits review.

Moreover, GM would have had standing even if it had been raising the rights of the "class" of out-of-State sellers. Under this Court's "prudential" standing doctrine of *jus tertii*, GM also plainly has standing to raise the constitutional rights of its sellers. (1) GM suffered an "injury in fact" by being forced to pay the taxes; (2) buyers and sellers have a sufficiently close relationship to allow one to raise the rights of the other, *Craig v. Boren*, 429 U.S. 190, 195-96 (1976) (vendor allowed to raise equal protection rights of customers); and (3) the out-of-State sellers, who likely make only a minimal percentage of their sales in Ohio, and are not liable for the taxes in any event, would have little, if any,

incentive to challenge the statute in their own name. *See generally Singleton v. Wulff*, 428 U.S. 106 (1976).

Certiorari should be granted to resolve this conflict.

C. The Issues Are Recurring And Important

The issues presented in this case have serious implications for the taxation of natural gas purchases nationwide. But these issues also have broad significance well beyond the specific industries involved in this case. If States are allowed, for taxing purposes, to draw distinctions based on whether or not a seller owns and utilizes its own delivery services, the door would be open to State taxation schemes which broadly favor in-State commerce and discriminate against interstate commerce.

One can imagine numerous examples of the mischief the Ohio Supreme Court's decision could be used to justify. Ohio could apply the reasoning approved by the court below and exempt purchases of local newspapers (such as the *Cleveland Plain Dealer* or the *Columbus Dispatch*) from sales tax, on the stated ground that those local papers utilize their own delivery services. Purchases of otherwise-similar national newspapers (*e.g., USA Today, The New York Times, The Wall Street Journal*), which contract with others for delivery services, would still be taxed. The result would plainly be favoritism of the local newspaper.

Next, Virginia could use the same logic to exempt sales tax on purchases of furniture from stores which deliver using their own delivery trucks. Virginia stores would be favored over stores in High Point, North Carolina, which sell furniture at deep discount prices but ship to buyers by common carrier. The result: Higher-priced local furniture gains a tax advantage, distorting the price advantage of the North Carolina sellers. *Compare, e.g., West Lynn Creamery*, 114 S. Ct. at 2211.

Finally, New York could exempt from tax all milk sold in the State, but only if delivered by the milk producer's in-State distribution facilities. The effect of that tax, too, would be economic balkanization, for Vermont milk producers simply do

not have their own distribution networks in New York State. *Compare id.*

Certiorari should be granted to consider these issues of wide-ranging and national importance.

II. THE OHIO SUPREME COURT'S DECISION ALSO CONFLICTS WITH THIS COURT'S EQUAL PROTECTION CLAUSE PRECEDENTS

As discussed in Section I above, the Ohio use tax as interpreted by that state's supreme court favors in-State sellers of natural gas. As a result, the use tax exemption also violates the Equal Protection Clause by favoring those who purchase from in-State sellers, at the expense of customers in interstate commerce such as GM. The Ohio Supreme Court's decision, which rejected GM's Equal Protection claim by refusing to acknowledge the discrimination, thus conflicts with *Metropolitan Life Ins. Co. v. Ward,* 470 U.S. 869 (1985). In *Metropolitan Life,* this Court held that discrimination against out-of-state interests often independently violates the Equal Protection Clause. *Id.* at 881. Moreover, since the statutory distinction burdens the fundamental right to engage in interstate commerce, strict scrutiny review under the Equal Protection Clause is appropriate *(see id.* at 878), and there is no adequate justification for the discrimination incorporated into the Ohio tax scheme.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 1, 1996

APPENDIX

SUPREME COURT OF OHIO

GENERAL MOTORS CORPORATION,
Appellant,

v.

TRACY, Tax Commr.,
Appellee

Nos. 94-642, 94-643 and 94-644.

Decided Aug. 9, 1995.

General Motors Corporation ("GM"), appellant, contests the assessment of use tax on its purchases of natural gas from out-of-state vendors.

GM purchased natural gas from independent natural gas marketers to heat its manufacturing plants. These marketers obtained natural gas from producers outside the state and arranged for transportation to the initial receiving pipeline of the national natural gas pipeline outside the state. These marketers did not own the transportation equipment; they paid a fee to pipeline companies to transport the natural gas to the insertion points. GM took title to the gas at delivery to the receiving pipeline outside the state. GM then arranged to transport and deliver the natural gas to its locations in Ohio: the Lordstown plant, the Defiance Central Foundry, and the Packard Electric facility in Warren.

The Tax Commissioner, appellee, assessed a use tax for various audit periods in these three cases because GM purchased the natural gas outside Ohio and consumed it in Ohio. GM appealed the commissioner's order to the Board of Tax Appeals ("BTA"), and the BTA affirmed the order (except for a penalty on preassessment interest), citing for support its decision in

Chrysler Corp. v. Tracy (Jan. 21, 1994), BTA No. 91-K-1523, unreported.

These causes are now before this court upon appeals as of right.

Jones, Day, Reavis & Pogue, John C. Duffy, Jr., Timothy B. Dyk and Gregory A. Castanias, Cleveland, for appellant.

Betty D. Montgomery, Atty. Gen., and Barton A. Hubbard, Asst. Atty. Gen., for appellee.

Emens, Kegler, Brown, Hill & Ritter Co., L.P.A., Paul D. Ritter, Jr., Holly R. Fischer and Thomas W. Hill, Columbus, urging affirmance for amicus curiae, Enron Access Corp.

PER CURIAM.

R.C. 5741.02 imposes a use tax on the storage, use, or consumption of tangible personal property in Ohio. R.C. 5741.02(C)(2) exempts from this tax acquisitions "which, if made in Ohio, would be a sale not subject to the tax imposed by sections 5739.01 to 5739.31 of the Revised Code." GM claims that the instant acquisitions would be exempt under R.C. 5739.02(B)(7) as sales of natural gas by a natural gas company.

However, in *Chrysler Corp. v. Tracy* (1995), 73 Ohio St.3d 26, 652 N.E.2d 185, we upheld the determination of the Public Utilities Commission of Ohio that a vendor in the type of sales now before us is by definition not a natural gas company and held that R.C. 5739.02(B)(7) does not exempt this type of sale. Consequently, we affirm the BTA's decision as to this claim.

GM also contends that the commissioner's application of this exemption statute violates the Commerce and Equal Protection Clauses of the Federal Constitution. According to *New Energy Co. of Indiana v. Limbach* (1988), 486 U.S. 269, 273-274, 108 S.Ct. 1803, 1807-1808, 100 L.Ed.2d 302, 308:

> It has long been accepted that the Commerce Clause not only grants Congress the authority to regulate commerce among the States, but also directly limits the power of the States to

discriminate against interstate commerce. *See, e.g., Hughes v. Oklahoma,* 441 U.S. 322, 326 [99 S.Ct. 1727, 1731, 60 L.Ed.2d 250, 255-256] (1979); *H.P. Hood & Sons, Inc. v. Du Mond,* 336 U.S. 525, 534-535 [69 S.Ct. 657, 663-664, 93 L.Ed. 865, 872-873] (1949); *Welton v. Missouri,* 91 U.S. 275 [23 L.Ed. 347] (1876). This 'negative' aspect of the Commerce Clause prohibits economic protectionism — that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors. *See, e.g., Bacchus Imports, Ltd. v. Dias,* 468 U.S. 263, 270-273 [104 S.Ct. 3049, 3054-3056, 82 L.Ed.2d 200, 208-210] (1984); *H.P. Hood & Sons, supra,* at 532-533 [69 S.Ct. at 662-663, 93 L.Ed. at 871-872]; *Guy v. Baltimore,* 100 U.S. 434, 443 [25 L.Ed. 743] (1880). Thus, state statutes that clearly discriminate against interstate commerce are routinely struck down, *see, e.g., Sporhase v. Nebraska ex rel. Douglas,* 458 U.S. 941 [102 S.Ct. 3456, 73 L.Ed.2d 1254] (1982); *Lewis v. BT Investment Managers, Inc.,* 447 U.S. 27 [100 S.Ct. 2009, 64 L.Ed.2d 702] (1980); *Dean Milk Co. v. Madison,* 340 U.S. 349 [71 S.Ct. 295, 95 L.Ed. 329] (1951), unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism, *see, e.g., Maine v. Taylor,* 477 U.S. 131 [106 S.Ct. 2440, 91 L.Ed.2d 110] (1986).

According to the testimony, the commissioner exempts sales of natural gas only if the selling companies own or operate the transportation and distribution equipment and deliver the natural gas to consumers in Ohio. GM reasons that only Ohio companies owning transportation and distribution equipment can qualify because only these domestic companies can physically deliver natural gas to Ohio consumers. Thus, so it argues, the commissioner's application is an undue burden on interstate commerce and invalid. The commissioner responds that he treats in-state and out-of-state purchases from independent marketers of natural gas the same; he does not exempt either one's sales if it does not own the transportation and distribution equipment.

We have before us purchases by GM of natural gas from a company that does not own any production, transportation, or distribution equipment. The commissioner claims that he would tax purchases from these persons whether they sold natural gas in-state or out-of-state. Thus, the commissioner's application of the statute does not benefit in-state purchasers by favoring in-state vendors over out-of-state vendors; he treats purchases from both the same. His application does not violate GM's Commerce Clause Protection.

On close inspection, GM actually argues that the commissioner's application burdens out-of-state vendors of natural gas. However, GM is not a member of that class and lacks standing to challenge the constitutionality of this application on that basis; our further comment on this question is inappropriate. *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.* (1994), 68 Ohio St.3d 547, 557-558, 629 N.E.2d 414, 422.

Also, GM's equal protection argument is submerged in its Commerce Clause argument. It claims that the Equal Protection Clause prohibits Ohio from imposing a more onerous use tax on out-of-state companies engaging in interstate commerce than on domestic companies. However, as concluded in the Commerce Clause discussion, the commissioner does not favor in-state purchases over out-of-state purchases. If the vendor does not own transportation or distribution equipment, the commissioner does not exempt its sales of natural gas to Ohio consumers.

Finally, GM contends that the BTA incorrectly determined that the commissioner did not abuse his discretion in remitting only a portion of the statutory penalty. According to *Jennings & Churella Constr. Co. v. Lindley* (1984), 10 Ohio St.3d 67, 70, 10 OBR 357, 359-360, 461 N.E.2d 897, 900:

> R.C. 5739.13 mandates the imposition of a penalty in the event of an assessment. Remission of the penalty is discretionary. In *Servomation Corp. v. Kosydar* (1976), 46 Ohio St.2d 67 [75 O.O.2d 147, 346 N.E.2d 290], we held this discretionary

power valid and constitutional as an exercise of the state's police power.

Appellate review of this discretionary power is limited to a determination of whether an abuse has occurred. *Interstate Motor Freight System v. Bowers* (1960), 170 Ohio St. 483 [11 O.O.2d 240, 166 N.E.2d 229]. An abuse of discretion connotes a decision that is unreasonable, arbitrary or unconscionable. *State v. Adams* (1980), 62 Ohio St.2d 151, 157 [16 O.O.3d 169, 173, 404 N.E.2d 144, 149]; *Chester Twp. v. Geauga Cty. Budget Comm.* (1976), 48 Ohio St.2d 372, 373 [2 O.O.3d 484, 358 N.E.2d 610, 611]. (Emphasis *sic*; footnote omitted.)

We have consistently refused to find an abuse of discretion on the commissioner's remitting a portion of the statutory penalty, even in the face of good-faith efforts at compliance. *Kings Entertainment Co. v. Limbach* (1992), 63 Ohio St.3d 369, 371, 588 N.E.2d 777, 779. Consequently, we affirm the BTA's decision on the penalty.

Accordingly, we affirm the BTA's decision, since it is reasonable and lawful.

Decision affirmed.

MOYER, C.J., and DOUGLAS, WRIGHT, RESNICK, FRANCIS E. SWEENEY, Sr., PFEIFER and COOK, JJ., concur.

OHIO BOARD OF TAX APPEALS

General Motors Corporation, Appellant,	)) CASE NO. 91-K-1558)
vs.	) (SALES AND USE TAX))
Roger W. Tracy, Tax Commissioner of Ohio, Appellee.	)) DECISION AND ORDER)

APPEARANCES:

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This cause and matter is before the Board of Tax Appeals as a result of a notice of appeal filed by appellant, General Motors Corporation, on November 29, 1991.[1] Appellant appeals a final order of the Tax Commissioner dated October 29, 1991, in which that official determined that appellant's purchases of natural gas were not exempt from use tax for the audit period of January 1, 1987 through December 31, 1989.[2]

In its notice of appeal, appellant specified the following as error existing in the Tax Commissioner's final order:

"1. The Commissioner erred in failing to find that GM's storage, use or other consumption of natural gas that was subjected to assessment here was exempt from the Ohio use tax by R.C. 5739.02(B)(7), as made applicable to the Ohio use tax by R.C. 5741.02(C)(2), because it was acquired from a 'natural gas company' within the meaning of R.C. 5727.01(E)(4) and delivered to GM in Ohio through 'pipes.'

"2. The Commissioner erred in failing to find that MNG must be considered a 'natural gas company within the meaning of R.C. 5727.01(E)(4) for purposes of determining whether GM's storage, use or other consumption of natural gas that was

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[1] By an interim order issued on September 11, 1992, this Board consolidated the present appeal with B.T.A. Case Nos. 92-K-146 and 92-K-510 solely for purposes of discovery and hearing. Subsequently, the parties stipulated certain issues which result in the same issues remaining in each of these appeals. However, due to the parties' agreements with respect to B.T.A. Case Nos. 92-K-146 and 92-K-510, this Board reaffirms its prior order to issue individual decisions in each appeal.

[2] Although referred to in the Tax Commissioner's final order as an assessment of "sales" tax, it appears that the assessments were actually a "use" tax imposed upon appellant's purchases of natural gas for use by its Buick-Olds-Cadillac Group.

subjected to assessment here was exempt from the Ohio use tax by R.C. 5739.02(B)(7), as made applicable to the Ohio use tax by R.C. 5741.02(C)(2).

"3. The Commissioner erred in finding that no 'relevant evidence' was presented to establish that MNG is a 'natural gas company' within the meaning of R.C. 5739.02(B)(7), as made applicable to the Ohio use tax by R.C. 5741.02(C)(2).

"4. The Commissioner's application here of the Ohio sales and use tax laws, particularly R.C. 5727.01, R.C. 5739.02 and R.C. 5741.02, is proscribed by the Commerce Clause of the United States Constitution because it results in an assessment of Ohio use tax on natural gas purchased outside the State of Ohio and delivered through pipes to consumers in Ohio when natural gas purchased within Ohio and delivered through pipes to consumers in Ohio would not be subjected to an Ohio sales or use tax.

"5. The Commissioner's application here of the Ohio sales and use tax laws, particularly R.C. 5727.01, R.C. 5739.02 and R.C. 5741.02, is proscribed by the Equal Protection Clause of the United States Constitution because it results in an assessment of Ohio use tax on natural gas purchased outside the State of Ohio and delivered through pipes to consumers in Ohio when natural gas purchased within Ohio and delivered through pipes to consumers in Ohio would not be subjected to an Ohio sales or use tax.

"6. Assuming, *arguendo*, that GM's storage, use or other consumption of natural gas in issue here is not exempt from Ohio use tax by R.C. 5739.02(B)(7), as made applicable to the Ohio use tax by R.C. 5741.02(C)(2), and, further that the assessment of Ohio use tax here is not proscribed by the Commerce Clause or the Equal Protection Clause of the United States Constitution, Ohio use tax was assessed erroneously on the storage, use or other consumption of natural gas in Ohio that was acquired for use by GM directly in producing tangible personal property for sale by manufacturing or processing. Accordingly, the storage[,] use or other consumption of such

natural gas was exempt from the Ohio use tax by R.C. 5739.01(E)(2), as made applicable to the Ohio use tax by R.C. 5741.02(C)(2).[3]

"7. Assuming, *arguendo*, that GM's storage, use or other consumption of natural gas in issue here is not exempt from Ohio use tax by either R.C. 5739.01(E)(2) or R.C. 5739.02(B)(7), as made applicable to the Ohio use tax by R.C. 5741.02(C)(2), and, further that the assessment of Ohio use tax here is not proscribed by the Commerce Clause or the Equal Protection Clause of the United States Constitution, R.C. 5739.133(A)(3) does not authorize the Commissioner to assess a penalty on preassessment interest charged pursuant to R.C. 5739.133(B).

"7. [sic] Assuming, *arguendo*, that GM's storage, use or other consumption of natural gas in issue here is not exempt from Ohio use tax by either R.C. 5739.01(E)(2) or R.C. 5739.02(B)(7), as made applicable to the Ohio use tax by R.C. 5741.02(C)(2), and, further that the assessment of Ohio use tax here is not proscribed by the Commerce Clause or the Equal Protection Clause of the United States Constitution, the Commissioner abused his discretion in failing to remit entirely any penalties assessed pursuant to R.C. 5739.133(A)."

This matter is now considered by this Board based upon appellant's notice of appeal, the statutory transcript certified by the Tax Commissioner, the evidence presented by the parties at

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[3] In its post-hearing brief, appellant has dismissed the specification of error which appears in each of its appeals which claims that "Ohio use tax was assessed erroneously on the storage, use or other consumption of natural gas in Ohio that was acquired for use by GM directly in producing tangible personal property for sale by manufacturing or processing." *Id.* at 3, fn. 3.

the hearing held before this Board on May 12 and May 14, 1993, and the post-hearing briefs of counsel.[4]

In 1974, appellant formed an Energy Supply Division whose initial function was to operate a natural gas field in northeast Ohio and to supply appellant's Ohio facilities with natural gas. Subsequently, in 1984, due to the deregulation of the natural gas industry, appellant's Energy Supply Division expanded its activities and began purchasing natural gas from suppliers and marketers and supplied approximately 130 of appellant's facilities located throughout the United States. During the audit period, appellant purchased the majority of its natural gas requirements from "marketers and/or producers of gas" (R.II at 76),[5] and arranged for the natural gas to be transported to its Ohio facilities for use in heating and powering. Appellant's Energy Supply Division was billed directly by both those companies which sold it natural gas for the cost of natural gas and by the pipeline companies and local distribution companies for the cost of transporting the natural gas to the facilities where it would be used. The Energy Supply Division paid these costs and billed each plant for the amount of natural gas provided. Included

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[4] We note that a single transcription of the evidentiary hearing has been prepared with respect to B.T.A. Case Nos. 91-K-1558, 92-K-146 and 92-K-510. That transcript, along with the documentary exhibits received into evidence will be considered by this Board with respect to all three appeals which are announced this date. In addition, given the common issues involved, the parties' post-hearing briefs refer to all three cases jointly. Accordingly, these briefs will be considered by this Board in addressing all three appeals.

[5] Although the Tax Commissioner referred in his final order only to appellant's purchases of natural gas from Mobil Natural Gas, Inc., it appears that appellant also purchased natural gas from Mobil Oil Corporation, Yankee Resources, Inc., Rocky Mountain Energy Exchange and Wellhead Enterprises. With respect to Yankee Resources, Inc., the evidence presented by appellant indicates that effective February 23, 1988, Yankee Resources, Inc.'s assets were sold to Yank Gas Acquisition, Inc.

within each billing were the costs of the natural gas, the costs of its transportation and a service charge imposed by the Energy Supply Division.

Following an audit of appellant's purchases, the Tax Commissioner assessed Ohio use tax on appellants purchases of natural gas. Thereafter, appellant filed a petition for reassessment in which it objected to the assessments and requested remission of the penalties which were imposed. Although a portion of the penalty was conditionally remitted, the Tax Commissioner denied appellant's objection to the assessment on the basis that appellant failed to prove that it purchased natural gas from a "natural gas company" as defined by the Revised Code. It is from this determination that appellant now appeals.

In reviewing appellant's appeal, we note that "[a]bsent a demonstration that the commissioner's findings are clearly unreasonable or unlawful, they are presumptively valid." *Alcan Aluminum Corp.* v. *Limbach* (1989), 42 Ohio St. 3d 121, 123. Consequently, it is incumbent upon a taxpayer challenging a finding of the Tax Commissioner to rebut that presumption and establish a right to the relief sought. *Belgrade Gardens* v. *Kosydar* (1974), 38 Ohio St. 2d 135; *Ohio Fast Freight* v. *Porterfield* (1972), 29 Ohio St. 2d 69.

R.C. 5739.02 levies an excise ("sales") tax on all retail sales made in Ohio while a similar excise ("use") tax is imposed upon the use of an item within Ohio by virtue of R.C. 5741.02. If the acquisition of an item is exempt from sales tax, it follows that it is also exempt from use tax. R.C. 5741.02(C). Since the analysis of Ohio's sales and use tax provisions is virtually identical for purposes of this appeal, we will refer to only the applicable sales tax provisions throughout the remainder of our decision.

Appellant claims that its purchases of natural gas are exempt from taxation based upon R.C. 5739.02(B), which provides in pertinent part:

"The tax does not apply to the following:

"***

"(7) Sales of natural gas by a natural gas company, of electricity by an electric company, of water — by a water-works company, or of steam by a heating company, if in each case the thing sold is delivered to consumers through wires, pipes, or conduits, and all sales of communications services by a telephone or telegraph company, all terms as defined in section 5727.01 of the Revised Code[.]"

As referenced in R.C. 5739.02(B)(7), the term "natural gas company" is defined in R.C. 5727.01, which provides in part:

"As used in this chapter:

"(A) 'Public utility' means each person referred to as a telephone company, telegraph company, electric company, natural gas company, pipe-line company, water-works company, water transportation company, heating company, rural electric company, or railroad company.

"***

"(E) Any person:

"***

"(4) Is a natural gas company when engaged in the business of supplying natural gas for lighting, power, or hearing purposes to consumers within this state[.]"

Accordingly, in order to qualify as a "natural gas company" under this statute, the entity at issue must be in the business of supplying natural gas to Ohio consumers for the purpose of lighting, power, or heating. We also find it appropriate to note the following provisions of R.C. 5727.02:

"As used in this chapter, 'public utility,' 'electric company,' 'natural gas company,' 'pipe-line company,' 'water-works company,' 'water transportation company' or 'heating company' does not include:

"(A) Any person that is engaged in some other business to which the supplying of electricity, heat, natural gas, water, water transportation, steam, or air to others is incidental;

"(B) Any person that supplies electricity, natural gas, water, water transportation, steam, or air to its tenants, whether for a separate charge or otherwise; or

"(C) Any person whose primary business in this state consists of producing, refining, or marketing petroleum or its products."

We find our decision recently announced in *Chrysler Corp.* v. *Tracy* (Jan. 21, 1994), B.T.A. Case No. 91-K-1523, unreported, to be dispositive of the issue now before us. In *Chrysler Corp.*, this Board concluded that a broker or marketer of natural gas, which did not produce natural gas, did not have the physical capabilities to transport natural gas to its customers, and which was not subject to regulation as a public utility, did not qualify as a "natural gas company" as that term is defined in R.C. 5727.01.[6]

In the present case, we find that appellant has failed to demonstrate that the companies from whom it purchased its natural gas requirements are natural gas companies as that term is defined by the General Assembly. Although the natural gas was used by appellant in powering and/or heating its facilities, we do find neither unreasonable nor unlawful the Tax Commissioner's finding that the companies from whom appellant contracted to purchase its natural gas requirements fell outside the definition of a "natural gas company" as set forth in R.C. 5727.01(E)(4).

We note that in its reply brief, appellant attempts to distinguish our decision in *Chrysler Corp.* from the present case. Appellant

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[6] The marketer of natural gas in *Chrysler Corp.* v. *Tracy* (Jan. 21, 1994), B.T.A. Case No. 91-K-1523, unreported, as in the present case, was Yankee Resources, Inc.

argues that *Chrysler Corp.* is not controlling since it involved an assessment of sales tax rather than use tax. We are unpersuaded that this fact alone justifies rejection of our application of that case to the present one given the complimentary nature of the two taxing provisions. Appellant also questions this Board's reliance upon *Central Trust Hardware Company* v. *Lindley* (Jul. 25, 1979), B.T.A. Case No. 78-C-244, unreported, wherein we concluded that a definition appearing in R.C. 5727.01 must be read in *pari materia* with the provisions appearing in R.C. 5727.02. Following a review of appellant's arguments, we do not believe that a different result is warranted in the present case.

Appellant also insists that this Board focus exclusively upon the word "supplying" which appears in R.C. 5727.01(E)(4), arguing that its dictionary definitions of that term support a finding that the companies from whom it purchased natural gas are natural gas companies. However, we believe that the term supplying must be reviewed in the context of R.C. Chapter 5727, which provides for the taxation of public utilities. We are persuaded by the Tax Commissioner's citation to *Volmer* v. *Village of Amherst* (1940), 65 Ohio App. 26, in which the court was called upon to interpret the phrase "the products or service of which is or is to be supplied to the municipality or its inhabitants" contained with Section 4, Article XVIII of the Ohio Constitution, as that phrase is applied to electric companies. The court stated in pertinent part:

> "'*** As applied to an electric public utility it is obvious that the words 'the products or service' refer to the generation of electricity, while the words 'to be supplied' refers to its distribution, and that within the meaning of said section an electric public utility is not complete unless it comprises both a generating plant and a distributing system. *Priest* v. *City of Wapakoneta* [(1937), 24 Ohio Law Abs., 214], at p. 224." *Id.* at 31.

While we recognize the factual distinctions which exists between *Volmer* and the present case, we believe the courts interpretation of the phrase "to be supplied" is consistent with

what we believe to have been the intent of the General Assembly in defining the term "natural gas company" as it appears in R.C. 5727.01(E)(4). As those transactions upon which appellant was assessed use tax involve the acquisition of natural gas from entities other than natural gas companies, we conclude that appellant's use of natural gas at its Ohio facilities is not exempt from tax. *Chrysler Corp.*, *supra*. Accordingly, appellant's specifications of error one, two and three are not well-taken and are therefore overruled.

In its specifications of error four and five, appellant claims that the Tax Commissioner's application of R.C. 5727.01, R.C. 5739.02 and R.C. 5741.02 violates both the Commerce Clause and the Equal Protection Clause of the United States Constitution. Clearly, this Board is without jurisdiction to determine the constitutional validity of a given statute. *S.S. Kresge Co.* v. *Bowers* (1960), 170 Ohio St. 405, paragraph one of the syllabus; *Herrick* v. *Kosydar* (1975), 44 Ohio St. 2d 128, 130; *Roosevelt Properties Co.* v. *Kinney* (1984), 12 Ohio St. 3d 7, 8; *Cleveland Gear Co.* v. *Limbach* (1988), 35 Ohio St. 3d 229, paragraph one of the syllabus. However, we may apparently rule upon an appellant's constitutional challenges with respect to the Tax Commissioner's application of a statute to a given set of facts. See *Bd. of Edn. of South-Western City Schools* v. *Kinney* (1986), 24 Ohio St. 3d 184, 185-186; *Cleveland Gear Co.*, *supra*.

In the present case, we do not find that appellant has demonstrated that the Tax Commissioner's imposition of use tax upon appellant's purchases is contrary to the cited provisions of the United States Constitution. Appellant argues at footnote two of its part-hearing brief that the Tax Commissioner assessed tax on appellants purchases of natural gas outside of Ohio while similar purchases of natural gas if made within Ohio would be exempt. However, it appears that the Tax Commissioner's assessment of use tax in the present case is not based upon where title to the natural gas passes. Instead, the Tax Commissioner appears to have assessed use tax upon purchases of natural gas from entities which are without the physical capabilities to transport and distribute natural gas to its customers. As we find

that appellant has not demonstrated the Tax Commissioner's application violates the Constitution, appellant's specifications of error four and five are not well-taken and are overruled.

As previously noted, appellant has dismissed its sixth specification of error. Therefore, we will address appellant's final two specifications of error collectively. Appellant first argues that the Tax Commissioner improperly imposed an additional penalty upon that portion of the penalty reflecting preassessment interest. We agree. In *Tramp Enterprises* v. *Tracy* (Sep. 17, 1993), B.T.A. Case No. 92-R-4, unreported, we held:

> "Applying the law to the facts of this case, the Board finds that the Tax Commissioner acted properly in imposing a penalty on the use tax assessed against the appellants. The Board further finds that the amount of the penalty, fifteen percent, was proper. However, the Board questions the propriety of the Tax Commissioner's action in imposing a fifteen per cent penalty on the preassessment interest amount.
>
> "As previously expressed, R.C. 5739.133(A) requires the Tax Commissioner to impose a penalty on every amount assessed under sections 5739.13 and 5739.15 of the Revised Code. In other words, penalties are to be applied to the amount of *tax* assessed. The Board finds that preassessment interest is not assessed *under* either R.C. 5739.13 or R.C. 5739.15. Rather, the authority to impose and assess preassessment interest is found in R.C. 5739.133(B).
>
> "Thus, construing the subject statutes in favor of the taxpayer as required under *Gulf Oil Corp.* v. *Kosydar* (1975), 44 Ohio St. 2d 208, 218, the Board finds that there is no statutory basis for the imposition of a fifteen per cent penalty on the preassessment interest assessed pursuant to R.C. 5739.133. ***
>
> "Based on the foregoing, the Board finds that with the exception of the fifteen per cent penalty applied to preassessment interest, the penalty imposed against the appellants based upon the use tax is appropriate. Moreover,

> based upon the record and applicable law, the Board does not find the penalty to be grossly inequitable, arbitrary, or capricious." *Id.* at 6-7. (Emphasis supplied and footnote omitted.)

See, also, *Ernst Enterprises, Inc.* v. *Tracy* (Dec. 23, 1992), B.T.A. Case No. 91-A-194, unreported.

Appellant also argues that although the Tax Commissioner conditionally reduced the penalty which was originally imposed to five percent of the assessment, the Tax Commissioner abused his discretion in refusing to remit the penalty in its entirety. In making this argument, appellant refers this Board to the Ohio Supreme Court's decision in *Frankelite Co.* v. *Lindley* (1986), 28 Ohio St. 3d 29, in which the court affirmed this Board's reversal of the Tax Commissioner's refusal to remit a penalty. The court quoted that portion of this Board's decision which related to the imposition of the penalty:

> "The Board of Tax Appeals finds that in this particular case, the appellant [Frankelite] has sufficiently shown that the failure to remit the penalty was an abuse of discretion. Frankelite had an established history of timely filing and payment of sales tax returns. Frankelite maintained an extensive file of exemption certificates and manifested a good faith reliance on them. Frankelite fully cooperated with the tax agents during the audit and undertook a massive campaign to comply with the agents' directions and orders. In short, the record before this Board is replete with demonstrations of appellant's honest and sincere attempts to comply with the tax laws of this state. We believe that the power to remit the statutory penalty was authorized to cover situations such as this." *Id.* at 31.

The court concluded that these reasons provided a sufficient factual basis for the Board's decision.

In the present case, appellant argues that its actions, like the taxpayer in *Frankelite*, justify a similar result. Specifically, appellant states in its post-hearing brief:

"The remarks of the Commissioner's agents clearly show that (i) GM demonstrated awareness of the Ohio sales and use tax law, (ii) exercised reasonable efforts to make timely payments of sales and use taxes, (iii) demonstrated a cooperative attitude toward the agents and the department, and (iv) where appropriate, self-imposed use tax on purchases in which there was no question with regard to the liability." *Id.* at 16.

In reviewing appellant's claim, it must be emphasized that it is incumbent upon a taxpayer to demonstrate that the Tax Commissioner abused that discretion with which he is vested in denying a request for the remission of a penalty. In *Huffman* v. *Hair Surgeon, Inc.*, (1985), 19 Ohio St. 3d 83, the Supreme Court explained what constitutes an abuse of discretion:

"'"[A]n abuse of discretion involves far more than a difference in * * * opinion * * *. The term discretion itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations. In order to have an 'abuse' in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias. * * *"' *State* v. *Jenkins* (1984), 15 Ohio St. 3d 164, 222." *Id.* at 87.

In the present case, we are unable to conclude that appellant has shown that the Tax Commissioner abused his discretion. While appellant's actions are to be commended, we do not believe that such actions demonstrate an abuse of discretion on the part of the Tax Commissioner. As the court indicated in *Huffman*, having discretion means choosing between competing interests. In this instance, the Tax Commissioner conditionally remitted a portion of the penalty, presumably taking into consideration appellant's actions. We believe that if we were to reverse the Tax Commissioner's decision in this regard, we would merely be substituting our judgment for his. Accordingly, appellant's seventh specification of error is well-taken and is sustained, while

what we will refer to as its eighth specification of error is not well-taken and is overruled.

Based upon the foregoing, it is the decision of this Board that appellant's seventh specification of error is hereby sustained while the remaining specifications of error are overruled. It is therefore the order of this Board that the final order of the Tax Commissioner is affirmed in part and reversed in part.

I hereby certify the foregoing to be a true and correct copy of the action of the Board of Tax Appeals of the State of Ohio, this day taken, with respect to the above matter.

/s/ Kiehner Johnson
Kiehner Johnson, Chairman

STATE OF OHIO
DEPARTMENT OF TAXATION

In the matter of Sales and Use Tax
Assessment, Serial No. 91002252 S

JOURNAL ENTRY

General Motors Corporation
Central Foundry Division
East Second Street
Defiance, Ohio 43512

Direct Pay Permit No. 98-001900

The Tax Commissioner came this day to consider the above styled matter at Columbus, Ohio. The petitioner appeared and presented at a hearing held at Toledo, Ohio, on August 16, 1991. Final determination is based upon information contained in the file, the petitioner's correspondence, evidence obtained at the hearing, and other relevant information available to the Commissioner.

Now, being fully advised thereon, the Commissioner finds that:

The petitioner, a division of General Motor Corporation, is engaged in the manufacturing of castings for use by the General Motors Assembly plants. This assessment results from an audit of its purchases over the period from October 1, 1986 through June 30, 1990. A timely petition for reassessment and a request for remission of penalty were filed by the petitioner. The petitioner has raised several objections on its petition for reassessment. Each objection will be addressed in detail below.

The taxpayer objects to the assessment of county permissive use tax under R.C. 5739.021 and 5741.02(B) on its withdrawal from inventory of its own vehicles for use in its Product Evaluation Program. The taxable use under R.C. 5741.02(B) which occurs when items are removed from inventory is not

affected by the exceptions for "incorporation into a product for sale" contained in 5739.01(E)(2) and the complementary use tax provisions of R.C. 5741.02(C)(2). That is, raw materials and/or component parts may be purchased under a claim of exception founded on "incorporation into a product for sale", under R.C. 5739.01(E)(2) and 5741.02(C)(2) but, after assembly, be subject to use tax under R.C. 5741.02(B) when withdrawn from inventory. Were this not the case, R.C. 5741.02(B) would have no meaning.

The Taxpayer contends that the holdings of *Fliteways v. Lindley* (1981), 65 Ohio St. 2d 21, *Jeep Corporation v. Limbach* (1989), 47 Ohio St. 3d 67, and the intent of the General Assembly in enacting Am. Sub. H.B. 298, effective 7-26-91, make the subject purchases exempt. In *Fliteways*, the taxpayer provided air charter service and pilot training, and sometimes purchased aircraft for the purpose of subsequent resale. In *Fliteways* the occasional use to defray costs of some purchased airplanes for flight training contrasts sharply with the use of the Program vehicles by the taxpayer. In the Program, a vehicle is not available for sale until after the prescribed mileage has been attained, and the Program participant has completed the evaluation of the vehicle. Rather than defraying costs the Program creates additional costs for the Taxpayer. Moreover, unlike in *Fliteways* where the use of the airplanes was incidental, the Taxpayer's Program systematically extends to hundreds of employees and thousands of vehicles throughout North America.

The Taxpayer also seeks to apply *Jeep Corporation v. Limbach, supra*, which held excepted from sales tax under R.C. 5739.01(E)(2), and the complementary use tax under R.C. 5741.02(C)(2), the purchase of raw materials used to make vehicles which were crash-tested and otherwise subjected to testing by engineers. *Jeep* clearly stands for the proposition that sales or use tax is not due on the purchase of raw materials by a manufacturer even though some percentage of those materials will be incorporated into items ultimately not sold. But the instant matter does not involve sales tax on purchases under R.C. 5739.01(E)(2) or the complementary use tax provisions of

5741.02(C)(2); it involves the *withdrawal from inventory* of finished product under R.C. 5741.02(B) and Ohio Adm. Code 5703-9-04.

In *Jeep* the Court was not presented with the question of whether there was a taxable use of the vehicles under R.C. 5741.02(B) when they were removed from inventory. It was confined to questions concerning incorporation of items into product for sale under R.C. 5739.01(E)(2) and the complementary use tax provisions of R.C. 5741.02(C)(2) for the period 1978 - 1982. The Court implied in broad dicta that "testing" is a nontaxable activity. The testing in *Jeep* was of several types, but all testing was performed by engineers. It was not the unscientific evaluation that takes place in the Taxpayer's Program. The Court held that "the primary use test, like the direct pay procedure, does not apply to the incorporation exception." 47 Ohio St. 3d at 70. Therefore, the Court reasoned, all of the materials used in manufacturing product, most of which is for sale, are excepted. The Court did not rule at all on the taxability of items withdrawn from stock and put to a use.

Moreover, "testing" was declared to be an adjunct use in R.C. 5739.01(R) [S.B. 92, effective 10-20-87], *provided that* the thing being manufactured was not removed from the manufacturing plant or facility for the test or check. Thus, after 10-20-87 the withdrawal of Program vehicles from inventory would not be exempt even if the Program use were considered "testing" for periods before that date, R.C. 5739.011(A)(4) [Am. H.B. 531, effective 7-1-90] defines testing as a process or procedure to identify the properties or assure the quality of a material or product. The Taxpayer's Program captures information which may be useful in making modifications in future production runs, but it is not a product quality control system encompassed by the definition. The objection is denied.

The petitioner next objects to the assessment of sales tax on the purchases of natural gas from Mobil Natural Gas, Inc. It claims that it purchased the gas from a natural gas company as defined in R.C. 5727.01. It is true that gas purchased from a qualified

natural gas company will be exempt from sales tax; however, other than a purchase contract provided by the petitioner, neither the petitioner nor the vendor provided any other relevant evidence to establish that Mobil Natural Gas, Inc. is a qualified natural gas company that is entitled to sell exempt gas. Since the petitioner has not satisfied the burden of proof, the objection is denied.

The petitioner also argues that the assessment of sales tax is erroneous on charges related to separately stated transportation cost on purchase of natural gas. Based on information provided by the petitioner at the hearing, the objection is allowed. This adjustment reduces use tax in the amount of $40,320.82.

Lastly, the petitioner objects to the assessment of sales tax on rental charges of vaporizers used to transform liquid nitrogen and oxygen into gas to create high temperature fuel for use in production machinery. It claims the vaporizers qualify as adjuncts under R.C. 5739.01(R)(2) and are excepted from use tax. The objection is well taken. The deletion of this use tax adjusts the percentage of error on expenses. This adjustment reduces use tax in the amount of $8,678.77.

The petitioner conceded to the objection relating to the purchases of core manufacturing equipment.

The adjustment made in the preceding paragraphs reduce the assessment by a total of $48,999.59 in use tax.

The request for penalty remission is granted conditionally as noted below.

Therefore, it is the order of the Tax Commissioner that if payment of:

	Assessment	*Penalty*	*Total*
(Sales Tax)	$171,742.16	$8,587.11	$180,329.27
(Use Tax)	297,537.88	14,876.89	312,414.77
(Preassessment Int.)	24,788.30	1,239.42	26,027.72
		Total.....	$518,771.76

is made within thirty (30) days after receipt by the taxpayer of this journal entry showing final determination, the assessment shall stand as adjusted in the above amount. In the event this matter is appealed to the Board of Tax Appeals, to an appropriate Court of Appeals, or to the Supreme Court, said thirty (30) day period shall begin to run from the date the entry of the Board of Tax Appeals is filed or the decision of an appropriate Appeals Court or the Supreme Court is rendered.

If the total amount is not paid as above provided, the assessment shall stand as adjusted in the following amount:

	Assessment	*Penalty*	*Total*
(Sales Tax)	$171,742.16	$25,761.32	$197,503.48
(Use Tax)	297,537.88	44,630.68	342,168.56
(Preassessment Int.)	24,788.30	3,718.25	28,506.55
		Total.....	$568,178.59

Payment of $299,549.72 was received subsequent to the issuance of the assessment and will be a credit against the above finding.

The unpaid amount of tax shall bear interest as prescribed by law from January 14, 1991 to the date of payment. This interest is in addition to either of the above total amounts and is due even payment is made within the thirty (30) day period mentioned above.

THIS REFLECTS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THE SUBJECT ASSESSMENT. UPON EXPIRATION OF THE THIRTY-DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02. THIS MATTER WILL BE CONCLUDED AND THE FILES APPROPRIATELY CLOSED.

/S/ROGER W. TRACY

Roger W. Tracy
Tax Commissioner

I HEREBY CERTIFY THE FOREGOING TO BE A TRUE AND CORRECT COPY OF THE ACTION OF THE TAX COMMISSIONER TAKEN THIS DAY WITH RESPECT TO THE ABOVE MATTER.

/s/Roger W. Tracy
ROGER W. TRACY
TAX COMMISSIONER

THE SUPREME COURT OF OHIO

1995 TERM

To wit: October 4, 1995

General Motors Corporation, Packard Electric Division, Appellant,	:	Case No. 94-642
v.	:	RECONSIDERATION ENTRY
Roger W. Tracy, Tax Commissioner of Ohio, Appellee.	:	(Board of Tax Appeals)

This cause came on for further consideration upon appellant's motion for reconsideration and the motion of Enron Access Corp. for leave to file brief amicus curiae in opposition to reconsideration. Upon consideration thereof,

IT IS ORDERED by the Court that the motions be, and hereby are, denied.

(Court of Appeals No. 92K146)

/s/Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

THE SUPREME COURT OF OHIO

1995 TERM

To wit: October 4, 1995

General Motors Corporation, Appellant,	:	Case No. 94-643
v.	:	RECONSIDERATION ENTRY
Roger W. Tracy, Tax Commissioner of Ohio, Appellee.	:	(Board of Tax Appeals)

This cause came on for further consideration upon appellant's motion for reconsideration and the motion of Enron Access Corp. for leave to file brief amicus curiae in opposition to reconsideration. Upon consideration thereof,

IT IS ORDERED by the Court that the motions be, and hereby are, denied.

(Court of Appeals No. 92K510)

/s/Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

THE SUPREME COURT OF OHIO

1995 TERM

To wit: October 4, 1995

General Motors Corporation, Appellant,	:	Case No. 94-644
v.	:	RECONSIDERATION ENTRY
Roger W. Tracy, Tax Commissioner of Ohio, Appellee.	:	(Board of Tax Appeals)

This cause came on for further consideration upon appellant's motion for reconsideration and the motion of Enron Access Corp. for leave to file brief amicus curiae in opposition to reconsideration. Upon consideration thereof,

IT IS ORDERED by the Court that the motions be, and hereby are, denied.

(Court of Appeals No. 92K4558)

/s/Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

RULE 29.6 DISCLOSURE

Pursuant to Supreme Court Rule 29.6, the following is a list of the non-wholly owned susidiaries of Petitioner General Motors Corporation.

2000 Aircraft Credit AB
ABA Motriz Financiamiento S.A. de C.V.
ABS Application Systems (Pty) Ltd.
ABS Computer Sales (Pty) Ltd.
ABS Computer Services (Pty) Ltd.
ABS Computer (Pty) Ltd.
ABS Information Technology (Pty) Ltd.
ACCSCO S.A.
Aeronautical Systems Designers Limited
AeroVironment, Inc.
Agora s.r.l.
Alambrados y Circuitos Electricos, S.A. de C.V.
Alpha Trans Leasing Verwaltungsgesellschaft mbH
AMBRAKE Corporation
American Mobile Satellite Corporation
AMRAAM International Licensing Company
Applied Intelligent Systems, Inc.
Aralmex, S.A. de C.V.
ARINC Incorporated
Aristaoom International, Inc.
ASEC Manufacuturing
ASEC Sales
Asset Leasing GmbH
Aura S.r.l.
Autocable Industries (Pty) Limited
Automotive Battery Manufacturing, Inc.
Automotive Polymer-Based Composites
Autos y Maquinas del Ecuador S.A. (AYMESA)
Banque Opel
Basintel S.p.A.
Beijing International Information Processing Company Limited
Beijing WY-GM Automotive Electronic Control Co., Limited

BSS Belgique
BSS Greece
Bujias Mexicanas, S.A. de C.V.
Calsonic Harrison Co., Ltd.
CAMI Automotive, Inc.
Canmax Inc.
Carus Grundstucks - Vermietungsgesellschaft mbH & Co.
Carus Grundstucks - Vermietungsgesellschaft mbH & Co.
CEI Co., Ltd.
China Management Systems Corporation
Cilva Holdings Plc
Cimflex Teknowledge
CLIOR
Coalition Undertaking Remedial Efforts, Inc.
COGSYS Limited
Compagnie des Faisceaux Tunisiens International S.A.
Compania Nacional de Direcciones Automotrices, S.A.
Componentes Delfa, C.A.
Comtrac Corporation
Controladora General Motors, S.A. de C.V.
Controladora Mexicana de Autopartes, S.A. de C.V.
Convergent Corporation
Daewoo Automotive Components, Ltd.
Database Software S.p.A.
Delkor Corporation (aka Chusikhoesa Delkor)
Delphi Ensamble de Cubiertas Automotrices, S.A. de C.V.
Delphi Packard Electric Venezuela C.A.
Delphi Vestiduras Fronterizas, S.A. de C.V.
Detroit Diesel Corporation
DHB - Componentes Automotivos S.A.
Diavia S.r.l.
DIRECTV Japan Kabushiki Kaisha
Doug Fox Parking, Inc.
DR DE CHIHUAHUA, S.A. de C.V.
DRB s.a./n.v. (a.k.a. Delco Remy Belgique)
Earth Observation Satellite Company
EDESA Societe Anonyme Holding
EDS-Padcom Clinical Research Beteiligungs GmbH

EDS Africa Limited
EDS Industries S.A.
EDS South Africa (Pty) Ltd.
EDS Vanco (Pty) Ltd.
Electrical Wiring Component Applications Partnership
Electronic Data Systems (EDS) Israel, Ltd.
Empresa Mixta GEMACVEN, S.A.
Empresa Nacional de Optica S.A.
Empresas "Ca-Le" de Tiaxcala, S.A. de C.V.
EPEC S.A. (a.k.a Ericson Packard Electric Componentes S.A.)
Europe Assurance Informatique S.A.
E.A.I. - Europe Assurance Informatique
Fabrica Nacional De Autobuses, C.A.
First Portland Technology Corp.
FLIR Systems, Inc.
Fox Travel Institute, Inc. (The)
France Informatique Juridique S.A.
Freevale Limited
Galaxy Latin America
Genasys L.C.
General Motors Colmotores, S.A.
General Motors de Argentina S.A.
General Motors Egypt, S.A.E.
General Motors India Limited
General Motors Kenya Limited
Genie Mecanique Zairois, S.A.R.L.
GEST'HELP Huissier
GFI-TB La Mondiale Bull S.A.
GM-Saab Communication GmbH
GM Credit AB
GM Finance HB
GM Nigeria Limited
GM Ovonic L.L.C.
GMAC de Argentina S.A.
GMB Belgique
Gulado y Control S.A.
G. & F. Company

G.M.A.C. Financiera de Colombia S.A. Compania de Financiamiento Comercial
H & D Radio Frequency Identification Products
H & R Company
HBH Company
Hitachi Data Systems Holding Corporation
HKV
HMK
Hughes-JVC Technology Corporation
Hughes-Kenwood RDSS, Inc.
Hughes-Pareto Research Partnership
Hughes Arabia Limited
Hughes Escorts Communications Limited
Hughes Ispat Limited
Hughes Olivetti Telecom, N.V.
Hughes Software Systems Private Limited
i-Logix Inc.
IBC Vehicles Limited
IBC Vehicles (Distribution) Limited
Industries Mecaniques Maghrebines, S.A.
Industrija Delova Automobila, Kikinda
Information Systems Solutions (Pty) Ltd.
Infosys
Insurance Software Solutions Corporation
Integrated Multimedia Solutions, Inc.
Interbank On-Line System Ltd.
International Electro-Optical Industry Anonim Sirketi
IRISS Company
Istiservice
Istituto R.S.O.
Isuzu-General Motors Australia Limited
Isuzu Motors Limited
ITC Inland Teknik Oto Yan Sanayi Limited Sirketi
ITT Automotive Electrical Systems, Inc.
I.K. Coach Co., Ltd.
Japan Network System
Japan Satellite Communications Network Corporation
Japan Systems Company Limited

Jinbei GM Automotive Co. Ltd.
Justinian Investments Sixteen (Pty) Ltd.
Kabeltrommel GmbH & Co. KG
Katoon, S.A. de C.V.
KDS Company, Ltd.
K.C.E. Company, Limited
KK. J.C.I.S.
K.K. Nihon Game Cards
LG-EDS Systems, Inc.
Low Emission Paint Research and Development Partnership
Lufthansa Systems GmbH
Macopel S.A. de C.V.
Management Technologies, Inc.
MCE
Metal Casting Technology, Inc.
Microelectronics and Computer Technology Corporation
MLT Holding Limited Partnership
M&DY Corporation (Pty) Ltd.
National Marketing Company
Neodata Corporation
New Cure, Inc.
New Dimension Software Ltd.
New United Motor Manufacturing, Inc.
New Venture Gear, Inc.
Nippon Avionics Co., Ltd.
Nippon EDS Company, Ltd. (a.k.a. Nippon EDS Kabushiki Kaisha)
North American New Cars, Inc.
Oel Systems (Pty) Ltd.
OGIP ORGANISATION SARL
Omnibus BB Transportes, S.A.
One Touch Systems, Inc.
Opel-Automobilwerk Eisenach-PKW GmbH (a.k.a. Opel-AWE GmbH)
Opel-Handler Versicherungsdienst GmbH
Opel-Wohnbau GmbH
OPEL Bankgesellschaft m.b.H.
Opel France S.A.

OPEL Leasinggesellschaft m.b.H.
Packard CTA Pty. Ltd.
Packard Electric Baicheng
Packard Electric Hebi
Packard Electric Vas kft
PDES, Inc.
Postal Buddy Corporation
Progical S.A.
Promotora de Partes Electricos Automotrices
Promotora S.A. de C.V.
PT General Motors Buana Indonesia
PT. Pasifik Satelit Nusantara
P.T. GMAC Lippo Finance
P.T. Mesin Isuzu Indonesia
RALS (a.k.a. RAM Alternate Launcher System)
Rio Bravo Electricos, S.A. de C.V.
Riser Foods, Inc.
Robotic Vision Systems, Inc.
Ruedas de Aluminio, C.A.
S O N I A S. A. A Directoire
Saab Automobile AB
SAFRI
Satelitron S.A. de C.V.
Serampang Hughes Sdn.Bhd.
Shanghai Hughes Network Systems
Shinsung Packard Company, Ltd.
Simpad, Sociedad Anonima de Capital Variable
Sipe Optimation S.p.A.
Sistemas de Asientos Para Vehiculos Automotrices, S.A. de C.V.
Sistemi & Technologie S.p.A.
SJ & LA Associates
Sociedad de Comercializacion Internacional Colmotores S.A.
Societe Auxiliare Pour Le Financement et Les Realisations Industrielles
Societe Flerienne De Participations
Societe Francaise des Amortisseurs de Carbon S.A.
Spectra Securities Software Inc.
Standard Missile Company, L.L.C.

Subarban Limited Liability Company
Sabaru-Isuzu Automotive, Inc.
Sung San Company, Ltd.
Supercomputer Automotive Applications Partnership
Suzuki Motor Corporation
SV-EDS Technology Services, Ltd.
Synon Italia s.r.l.
Systems & Management S.p.A.
SYSTER-Informatique
Telemac S.A.R.L.
Telemesures Acoustiques Telemac S.A.R.L.
Teramira Holdings, Inc.
The Gulf Industrial Technology Company (KSC)
Translant, Inc.
UKADGE Systems Limited
UMW-EDS Technologies Sdn. Bhd.
UMW Holdings Berhad
United Australian Automotive Industries Limited
United States Automotive Materials Partnership
UPE Systems Services Sdn. Bhd.
Uveral S.A.
U.M.I. Universal Motors Israel Ltd.
Video Lottery Technologies, Inc.
View Engineering, Inc.
Volvo GM Canada Heavy Truck Corporation
Volvo GM Heavy Truck Corporation
White House Consulting (Pty) Ltd.
White House Midrange Services (Pty) Ltd.
White House Technologies (Pty) Ltd.
Woodbridge Foam Deutschland, GMBH
Worldmaster Marketing Pty Ltd.
Zhejiang Delphi Asia-Pacific Brake Co. Ltd.

Supreme Court, U.S.
FILED
MAR 1 1996
CLERK

No. 95-1232

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

GENERAL MOTORS CORPORATION,
v.
Petitioner,

ROGER W. TRACY,
TAX COMMISSIONER OF OHIO,

Respondent.

On Petition for Writ of Certiorari to the
Supreme Court of Ohio

RESPONDENT'S BRIEF IN OPPOSITION

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COUNSEL FOR RESPONDENT

QUESTIONS PRESENTED

1. May a taxpayer continue to assert a constitutional challenge before this Court where the State's supreme court decided as a matter of State law that the sole premise for the challenge did not exist, and may new premises now be asserted in violation of the State's jurisdictional rules where no evidentiary basis exists for considering and deciding such premises?

2. Assuming that the constitutional challenge may be heard: Does an exemption from sales and use tax that applies to natural gas sold by persons engaged in the regulated business of physically delivering gas through pipelines, but which does not apply to gas sold by unregulated marketers who do not physically deliver the gas, discriminate against interstate commerce or violate equal protection guarantees, where Petitioner has identified no way in which imposition of the tax depends upon the location of production, purchase or delivery of the gas?

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3. LIMITING THE SALES AND USE TAX EXEMPTION TO GAS PURCHASED FROM PUBLIC UTILITY GAS COMPANIES IMPOSES NO TARIFF, BECAUSE THE BURDEN OF TAXATION IN NO WAY DEPENDS UPON THE LOCATION OF PRODUCTION, PURCHASE OR DELIVERY OF NATURAL GAS. INSTEAD, THE EXEMPTION VALIDLY REFLECTS THE FUNDAMENTALLY DIFFERENT NATURE OF THE UTILITY BUSINESS 11

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No. 95-1232

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

GENERAL MOTORS CORPORATION,
v.
Petitioner,

ROGER W. TRACY,
TAX COMMISSIONER OF OHIO,

Respondent.

On Petition for Writ of Certiorari to the
Supreme Court of Ohio

RESPONDENT'S BRIEF IN OPPOSITION

IMPORTANT STATUTORY PROVISIONS

The Ohio statutes show that the exemption at issue is part of a separate system of taxing and regulating natural gas companies and other public utilities. As applied to natural gas companies the relevant provisions are:

1. Section 5739.02(B)(7) of the Ohio Revised Code provides the following sales tax exemption:

> (B) The tax does not apply to the following:
>
> (7) Sales of natural gas by a natural gas

> company, of water by a waterworks company, or of steam by a heating company, if in each case the thing sold is delivered to consumers through wires, pipes, or conduits, and all sales of communications services by a telephone or telegraph company, all terms as defined in section 5727.01 of the Revised Code;

2. Section 5727.01(D)(4), previously (E)(4), of the Ohio Revised Code provides the following definition of "natural gas company" for purposes of the public utility gross receipts and personal property taxes:

> (D) Any person:
>
> (4) Is a natural gas company when engaged in the business of supplying natural gas for lighting, power, or heating purposes to consumers within this state;

3. Section 4905.03(A)(6) of the Ohio Revised Code provides the following definition "natural gas company" for purposes of public utility regulation:

> (A) Any person ... is:
>
> (6) A natural gas company, when engaged in the business of supplying natural gas for lighting, power, or heating purposes to consumers within this state ...

STATEMENT

General Motors Corporation ("General Motors") initiated this case by contesting the assessment of use tax with respect to certain purchases of natural gas. It sought the benefit of a limited exemption from sales and use taxation, which applies to sales of natural gas by a regulated natural gas utility company. However, the Ohio Tax Commissioner, the Ohio Board of Tax Appeals and the Ohio Supreme Court all agreed that the exemption did not apply with respect to gas purchased from unregulated natural gas marketers.

In the proceedings below, General Motors raised a single constitutional challenge to the assessment, but was completely unable to substantiate the underlying premise of that challenge. General Motors contended that Ohio had discriminatorily imposed the tax based upon whether the gas was purchased within Ohio or outside of Ohio. As this allegation of discriminatory taxation was refuted by testimony presented to the Board of Tax Appeals, the Board concluded that the Ohio Tax Commissioner did not determine tax liability based upon the location of the purchase. In affirming that "natural gas company" for purposes of exemption from sales and use taxation had the identical meaning as the same term for purposes of utility regulation, the Ohio Supreme Court thereby clarified that the place at which title to natural gas passed did not form the basis for denying the exemption.

Specifically, General Motors asserted before the Board of Tax Appeals that its purchases of natural gas from marketers, delivered by natural gas utility companies to General Motors in Ohio, were "out-of-state" purchases because title to the gas passed from the marketers to General Motors outside of Ohio. Under General Motor's theory, if title to the gas had passed to General Motors within Ohio,

the Ohio Tax Commissioner would allegedly have exempted General Motors' purchases from sales and use taxation. However, unrebutted testimony by key personnel of the Ohio Tax Commissioner presented at the evidentiary hearing before the Board of Tax Appeals refuted General Motors' allegation of discriminatory taxation: what mattered for tax purposes was not the place where title to natural gas was transferred, but whether the gas was purchased from natural gas marketers (a taxable transaction) or regulated natural gas utilities (exempt). I Tr. 29-30, 42-51, 90-95; II Tr. 186-189. The latter type of seller is a "natural gas company" subject to taxation and regulation as a public utility.

Now, General Motors suggests that the distinction between an unregulated marketer and a regulated natural gas utility somehow discriminates against interstate commerce. In this respect, the petition exalts linguistic implication over substantive argument. Nowhere does General Motors specify any factual basis for asserting a discrimination against interstate commerce in this instance.

Instead, General Motors attempts to mislead by mislabeling activities as "in-state" or "out-of-state" where the record in fact shows no such distinction. For example, the petition repeatedly refers to the marketers as "out-of-state" entities and regulated natural gas utility companies as "in-state" entities, but the record does not support this labeling. In fact, General Motors' own exhibit [Ex. 22, Supp. 632] reveals that one of the principal marketers from whom General Motors purchased, Yankee Resources, Inc. (later Access Energy Corp.) now known as Enron Access Corp., has its principal office in Dublin, Ohio.[1] Likewise, the

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[1] Enron Access filed an amicus brief *in support of the Tax Commissioner*--not General Motors--in the Ohio Supreme Court, and is now filing as an amicus in opposition to General Motors' certiorari

record is devoid of any evidence that the Ohio Tax Commissioner restrictively applied the definition of "natural gas company" only to those entities whose corporate headquarters, offices or activities were exclusively within Ohio.

By mischaracterizing the assessment as a "tariff," General Motors suggests that the tax is somehow imposed only with respect to natural gas that originates outside Ohio. Not only is there no support for such an implication in the record but the testimony establishing the criterion for denying the exemption refutes it. I Tr. 29-30, 42-51, 90-95; II Tr. 186-189. While the cases General Motors cites prohibit tariffs, Ohio's tax structure simply does not impose such a discriminatory tax.

Ultimately, the natural gas utility exemption has a reasonable basis, because by its nature the business of physically delivering natural gas to consumers is different from the business of brokering natural gas sales. Indeed, a natural gas company is a public utility, heavily regulated in every aspect of its business, and therefore has a totally different relationship to the public from that of an unregulated gas marketing business. The exemption clearly lies well within Ohio's legitimate exercise of its sovereign taxing power. Accordingly, this case presents no question of substance for this Court to consider.

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petition. The nature of Enron Access' marketing business is well-described in an order of the Public Utilities Commission of Ohio, holding that Enron Access' business of brokering natural gas contracts does not subject it to Ohio public utility regulation. *In the matter of the Application of Yankee Resources, Inc. (Sept. 9, 1982), PUCO No. 82-1086-GA-ARJ,* unreported (App. at *2a-5a).*

REASONS THE PETITION SHOULD BE DENIED

1. Introduction

The petition for certiorari should be denied because the grounds for exercising jurisdiction are not present. As stated in Supreme Court Rules 10.1(b) and (c), certiorari is proper "[w]hen a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals," or "[w]hen a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court." General Motors has not even alleged, let alone shown, any conflict between state courts or between state and federal appeals courts, and the only commerce clause decisions of this Court that General Motors cites address discrimination against interstate commerce, which is not present here.

Moreover, General Motors fails to establish that this case presents any "important federal question" whatsoever. Completely absent from the petition is any allegation of how interstate commerce is impeded by separately taxing and regulating public utilities. To the contrary, the amicus Enron Access--the only marketer and alleged interstate commerce "victim" before this Court--asserts that the separate tax and regulatory treatment facilitates its own business of brokering interstate natural gas contracts, and therefore Enron strongly opposes General Motors' petition.

Finally, General Motors' assertion that its petition raises "a recurring issue" (Pet'n. at 14) is belied by its failure to cite any other case in which a taxpayer has challenged a state's classification of natural gas utilities

differently from natural gas marketers. If this were "a recurring issue" it would become important enough for consideration by state and federal courts, and any resulting conflict among their decisions could later be resolved by this Court once the issue had fully ripened for this Court's consideration.

2. GENERAL MOTORS MAY NOT CONTINUE TO ASSERT ITS CONSTITUTIONAL CHALLENGE BEFORE THIS COURT BECAUSE THE OHIO SUPREME COURT DECIDED AS A MATTER OF STATE LAW THAT THE ASSERTED PREMISE FOR THE CHALLENGE DOES NOT EXIST, AND ANY CHALLENGE BASED UPON NEW FACTUAL OR LEGAL PREMISES SHOULD NOT BE HEARD BECAUSE THE RECORD CONTAINS NO EVIDENTIARY BASIS FOR CONSIDERING THESE NEW ARGUMENTS.

Below, General Motors based its constitutional challenge on where title to the gas was transferred. Here, General Motors bases its constitutional challenge on the nature of the entities. General Motors cannot change horses in mid-stream.

Before the Ohio Board of Tax Appeals, General Motors specified the following claim:

> The [Ohio Tax] Commissioner's application here of the Ohio sales and use tax laws... is proscribed by the Commerce Clause [or the Equal Protection Clause] of the United States Constitution because it results in an assessment of Ohio use tax on natural gas *purchased outside the State of Ohio* and delivered through pipes to consumers in Ohio

> when natural gas *purchased within Ohio* and delivered through pipes to consumers in Ohio would not be subjected to an Ohio sales or use tax. (Emphasis added.) App. at 8a-9a.

No additional constitutional issues were asserted to the Board, and Ohio law requires precise specification of each such issue in order to create jurisdiction. Ohio Revised Code Section 5717.02; *Cleveland Gear Co. v. Limbach*, 520 N.E. 2d 94, syl. para. 3 (Ohio 1980), *Norandex, Inc. v. Limbach*, 630 N.E.2d 329, 333 n.1 (Ohio 1994) (taxpayer's properly asserted commerce clause challenge under the "substantial nexus" prong of the *Complete Auto* test did not confer jurisdiction to consider later challenge based upon the "fair apportionment" prong of the *Complete Auto* test).

Nor is this rule merely procedural. As the Ohio Supreme Court previously explained, specification of error is necessary in order to give both sides the opportunity to fully develop the case:

> Had the equal protection issue in this case, for instance, been raised during the proceedings before the attorney examiner, it is entirely possible that the City of Columbus would have developed an evidentiary record sufficient to show that the statute was applied constitutionally. By waiting until now to raise the issue, the school board has deprived the city of an opportunity to develop the record on the point. This itself raises due process considerations. *South-Western City Schools v. Kinney*, 494 N.E.2d 1109, 1111 (Ohio 1986).

In this case, General Motors asserted a single premise for its constitutional claim: a purported discrimination

between in-state and out-of-state purchases. The Board of Tax Appeals rejected the asserted premise, finding that "the Tax Commissioner's assessment of use tax in the present case is not based upon where title to the natural gas passes..." because the tax was assessed upon "purchases of natural gas from entities which are without the physical capabilities to transport and distribute natural gas to its customers." *General Motors Corp. v. Tracy* (Jan. 21, 1994), B.T.A. Case No. 91-K-1558, unreported at 13; Appendix to General Motors' Petition at 15a.

The Ohio Supreme Court did the same. The Court held that the Tax Commissioner's application of the statute did not "favor in-state vendors over out-of-state vendors" because he "treat[ed] purchases from both the same." *General Motors Corp. v. Tracy*, 652 N.E.2d 188 (Ohio 1995). In doing so, the Supreme Court relied upon *Chrysler Corp. v. Tracy*, 652 N.E.2d 185 (Ohio 1995)[2], that gas purchased from a natural gas marketer did not fall within the exemption of purchases from a "natural gas company," because the marketer was not, as required by the statute, "engaged in the business of supplying natural gas..." *General Motors*, 652 N.E. 2d at 189.

Despite the different argument raised below, General Motors now argues that the very tax distinction between gas sold by a public utility and gas brokered by independent marketers is somehow unconstitutional. As noted above, this contention was never presented to the Ohio Board of Tax Appeals--a jurisdictional requirement of Ohio law. As a result, the Tax Commissioner of Ohio had no reason or

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[2] Chrysler, it is worth adding, raised no constitutional challenges to the Commissioner's assessment of sales and use taxes on its purchases of natural gas from the marketer Access Energy Corp., one of the very marketers from whom General Motors purchased in the present case.

opportunity to develop evidence rebutting the unfounded assertion. The lack of factual record raises powerful jurisdictional and prudential reasons for this Court to decline to hear this newly minted argument. See *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969) (dismissing certiorari writ where constitutional challenge to state statute was not properly raised and evidentiary record not developed in the state court) ("Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality."). See also *Wilson v. Cook*, 327 U.S. 474, 483 (1945) (even though the question presented was "in some manner related to that decided by the state court," the question would not be considered because it was "so distinct from the question decided by the state court that our decision in the issue raised there would not necessarily decide that now sought to be raised.").

This reasoning applies with particular force here. In response to General Motors' allegation that the imposition of tax depended upon the place title to natural gas was transferred, the Ohio Tax Commissioner introduced evidence--the uncontroverted testimony of top operating personnel within the Department of Taxation--showing that no such distinction had been made. Under these circumstances, the Commissioner had no reason to introduce evidence regarding the relative overall tax burdens on gas sold by marketers as opposed to gas sold by the natural gas utility companies, for the simple reason that General Motors did not place the distinction at issue before the Ohio Board of Tax Appeals.

On this record the writ should be denied.[3]

3. LIMITING THE SALES AND USE TAX EXEMPTION TO GAS PURCHASED FROM PUBLIC UTILITY GAS COMPANIES IMPOSES NO TARIFF, BECAUSE THE BURDEN OF TAXATION IN NO WAY DEPENDS UPON THE LOCATION OF PRODUCTION, PURCHASE OR DELIVERY OF NATURAL GAS. INSTEAD, THE EXEMPTION VALIDLY REFLECTS THE FUNDAMENTALLY DIFFERENT NATURE OF THE UTILITY BUSINESS.

The players in the business of selling natural gas are natural gas marketers and natural gas utilities. In its petition, General Motors does not assert any discrimination in the Ohio sales and use tax law between sales by "in-state" marketers and sales by "out-of-state" marketers. Nor does General Motors assert any discrimination between sales by "in-state" utilities and sales by "out-of-state" utilities. Instead, General Motors alleges discrimination between sales

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[3] Indeed, the record as it now stands shows that (i)marketers are engaged in brokering bulk gas sales largely to industrial consumers; (ii) gas purchased for direct use in manufacturing enjoys complete exemption from sales and use taxation--a substantial benefit to General Motors here; and (iii) gas sales by utilities are subject to the gross receipts tax imposed on utilities generally (but not on unregulated natural gas marketers), under which there is no manufacturing exemption. It is highly probable that further evidence would show an overall favorable treatment of marketer gas sales by comparison with utility gas sales, thereby removing the very premise General Motors now--in the absence of a developed record--appears to assert. See *Associated Industries v. Lohman*, 114 S.Ct. 1815, 1824-25 (1994) (declining to find uniform use tax on purchases from out-of-state vendors unconstitutional as applied with respect to taxing districts imposing a greater sales tax burden than the uniform use tax rate): "[W]e have emphasized that 'equality for purposes of ... the flow of commerce is measured in dollars and cents, not legal abstractions.'"

by utilities and sales by marketers. This is based on an "apples to oranges" comparison, and simply does not constitute an unlawful "discrimination" under this Court's commerce clause analysis.

At page 11 of its petition, General Motors asserts that "the Ohio scheme appears to be little more than a tariff on all gas not sold by a local public utility." Indeed, the cases cited by General Motors all relate to claims of direct discrimination against interstate commerce by taxes that amount to partial tariffs. General Motors slyly suggests a discrimination against interstate commerce by speaking of gas sold by a "local" public utility, but this is a red herring because the physical delivery of natural gas to General Motors facilities--including the delivery of gas purchased through marketers--occurs through pipelines controlled by those same public utilities. There is no "non-local" or "interstate" public utility here to be discriminated against. Instead, there is only the distinction between purchases from unregulated marketers and purchases from the regulated natural gas utility itself, which is a unique business.

Black's Law Dictionary (6th ed. 1990) at 1456-57 defines tariff as "a series of schedules or rates of taxes on imported goods." The key word is "import": a tariff, unlike other taxes, falls upon particular goods based upon the location in which they are produced and placed into commerce. Without specifically saying how, General Motors suggests that the limited exemption for natural gas companies at issue here somehow rests upon the location of production, purchase or delivery of natural gas rather than constituting--as it in fact does--a legitimate distinction based upon the completely different nature of the regulated natural gas utility business.

The crucial distinction was drawn by this Court in

Amerada Hess Corp. v. N.J. Taxation Div., 490 U.S. 66 (1989). In that case, integrated oil companies were subject to a federal windfall profits tax because they produced oil, while oil distributing companies did not pay windfall tax because they did not engage in production activities at all. New Jersey required corporations paying business tax to "add back" into taxable income any amount deducted in calculating the federal taxable income figure if that amount pertained to a tax on profits or income. The integrated oil companies argued that the requirement to "add back" windfall tax, which they had properly deducted on their federal returns, effected a discrimination against them in favor of oil distributors. The alleged discrimination was purported to violate commerce clause and equal protection principles, but this Court disagreed:

> [W]hatever disadvantage this deduction denial might impose on integrated oil companies does not constitute discrimination against interstate commerce. Appellants [integrated oil companies] operate both in New Jersey and outside New Jersey. Similarly, non-producing retailers may operate both in New Jersey and outside the State. *Whatever different effect the add-back provision may have on these two categories of companies results solely from differences between the nature of their businesses, not from the location of their activities.* (Emphasis added.)
>
> 490 U.S. at 78.

Thus, a tax distinction based upon the nature of a business rather than the location of business activity passes constitutional muster.

What is more, in each of the cases cited by General Motors, the imposition of tax depended upon the place of origination or other related business activity.[4] That simply

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[4] Each of the cases relies on clear distinctions between in-state or out-of-state business activities not present here: (i) An assessment and rebate scheme that effectively pushed the burden of taxation upon out-of-state milk producers while reimbursing and relieving in-state producers violated the commerce clause in *West Lynn Creamery v. Lynn*, 129 L.Ed.2d 157 (1994); (ii) The exemption from a general sales tax for locally produced liquor discriminated against commerce in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984); (iii) The imposition of a use tax rate on out-of-state purchases that was higher than the sales tax rate for a particular in-state taxing district violated the commerce clause in *Associated Industries v. Lohman*, 114 S.Ct. 1815 (1994); (iv) A Pennsylvania flat tax per axle which placed a disproportionate burden on truckers whose vehicles were not registered in Pennsylvania was unlawfully discriminatory in *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266 (1987); (v) A state statute purporting to permit counties to exclude from landfills waste generated outside the county violated the commerce clause in *Fort Gratiot Sanitary Landfill v. Michigan Department of Natural Resources*, 112 S.Ct. 2019 (1992); (vi) A local ordinance mandating that all waste processing be accomplished at a specified local facility violated the commerce clause by forcing all such activity to be conducted at the specified location and thereby discriminating against all other persons--including out-of-state businesses--engaged in providing waste processing services, *C. & A. Carbone Inc. v. Town of Clarksburg*, 114 S.Ct. 1677 (1994); (vii) A local ordinance forbidding the sale of milk within the city unless pasteurized within a five mile radius unconstitutionally discriminated against milk pasteurized elsewhere and imported, including out-of-state milk, in *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951); (viii) Special inspection requirements for meat slaughtered more than 100 miles from the place of sale discriminated against interstate commerce in *Brimmer v. Rebman*, 138 U.S. 78 (1891); (ix) A tax credit favoring ethanol produced in-state constituted clear discrimination against ethanol produced in other states in violation of the commerce clause, and was not saved by a reciprocity provision, *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269 (1988); (x) Including labor and shop costs in use tax calculation where the user of equipment manufactured the equipment out of state violated the commerce clause where such costs would not be taxed against a user who

is not the case here. By contrast, Ohio has created a limited exemption from sales and use taxation as part of a comprehensive system of regulating and taxing public utilities. The exemption pertains to the highly regulated and monopolistic nature of utility businesses, not to some scheme to burden interstate commerce. Therefore, the tax is not a tariff at all, and General Motors' bare assertion of discrimination does not create a constitutional claim.

Just as significantly, General Motors makes no attempt to specify any factual basis for its nebulous claim that the Ohio Tax Commissioner discriminated against "out-of-state purchases." No such evidence exists. The record refutes any inference that the imposition of tax depends upon the place where the natural gas originates.

General Motors attempts to analogize to newspaper publishing and furniture retailing (Pet'n., at 14). These scenarios are no analogy at all because they contain two key factual premises which are not present in this case. First, there is nothing analogous to "in-state" as opposed to "out-of-state" newspaper or furniture production here, because the assessment of use tax with respect to natural gas purchases is not based upon where the gas is produced. Second, the record incontestably establishes that the natural gas purchased through dealings with marketers and the gas purchased from the natural gas utility company itself are physically delivered to the consumer through pipelines controlled by the utility. Thus, no distinction arises between the means by which natural gas sold by marketers is delivered and the means by which natural gas sold by utilities is delivered. Therefore, these scenarios distort rather than clarify this case.

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manufactured the equipment in-state, *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963).

General Motors also continues to ignore the central fact in this case: the exemption from sales and use taxation constitutes one aspect of a comprehensive scheme of taxing and regulating public utilities. Far from constituting a "tariff," the existence of an exemption for gas sold by "natural gas companies," *i.e.*, companies engaged in the business of physically distributing gas to consumers through pipelines, reflects the particular, highly regulated nature of the public utility business.

First, the sales and use tax exemption in Ohio Revised Code Section 5739.02(B)(7) applies to various types of entities that are taxed and regulated as public utilities by Ohio, including electric companies, water companies and heating companies, as well as natural gas companies. As regulated public utilities, all are required to supply to the general public on terms prescribed by the public utility regulatory law. Second, natural gas companies--like other regulated utilities--are subject to a number of taxes unique to public utilities, including the public utility property tax and the public utility gross receipts tax imposed pursuant to Ohio Revised Code Chapter 5727. Finally, public utilities are subject to a panoply of regulations, including those limiting the freedom of such companies to deal with specific customers or charge certain rates.

By stark contrast, the independent unregulated marketers are free, on a contract-by-contract basis, to broker deals with consumers such as General Motors to meet unique industrial needs. The marketers do not operate pipelines at all and do not engage in physical distribution of gas to consumers. The completely different nature of their business and the complete freedom from regulation was clearly established in the testimony of Steven Jaffe, executive vice president of one of General Motors' principal marketers, Enron Access Corp., then known as Access Energy Corp.

II. TR. 150-157.

Because their businesses are entirely different in nature, the granting of an exemption with respect to gas sold by the utility itself does not raise commerce clause or equal protection concerns in this instance. Indeed, this Court has rejected equal protection challenges by acknowledging the inherent rationality of distinguishing for tax purposes between companies that own infrastructure within a state to engage in physical distribution, and companies that own no such facilities but instead contract with others to make their deliveries. See *Pacific Express Co. v. Seibert*, 142 U.S. 339, 353 (1892) (express companies, which contracted with railroads and steamboat companies for the transportation services they sold could rationally be subjected to a gross receipts tax from which the railroads and steamboat companies themselves were exempt); *Citizens' Telephone Co. v. Fuller*, 229 U.S. 322, 352 (1913): "... [The statute] has a reasonable basis, resting on a real distinction. ... There is a difference in the doing of business and its results: a difference in relation to the public."

Likewise, public utility gas companies and independent marketers of gas engage in different businesses and occupy different positions in the chain of transactions that brings natural gas from the well to a consumer such as petitioner. Accordingly, neither the commerce clause nor the equal protection clause requires the utility business to be treated the same for tax purposes as the totally different business of brokering natural gas contracts.

Finally, acceptance of General Motors underlying premise in this case--that a state cannot validly classify public utilities engaged in physical transmission of natural gas differently from private marketers that merely broker natural gas contracts--would inundate this Court with a tidal wave of

commerce clause challenges. Suddenly, long-standing state statutory schemes classifying public utilities differently from private, unregulated entities would be rendered constitutionally suspect. General Motors' petition identifies no reason to call into question well-established law.

CONCLUSION

For all the foregoing reasons, the Tax Commissioner of Ohio respectfully requests this Court to deny the petition for certiorari.

Respectfully submitted,
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APPENDIX

Order of The Public Utilities Commission of Ohio, *In the Matter of the Application of Yankee Resources, Inc.* (Sept. 9, 1982), PUCO No. 82-1086-GA-ARJ 2a

Notice of Appeal of Appellant, General Motors Corporation, to the Ohio Board of Tax Appeals in *General Motors Corporation v. Roger W. Tracy, Tax* Commissioner of Ohio, B.T.A. Case No. 91-K-1558, filed November 19, 1991 . . . . . 6a

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Yankee Resources, Inc., for Relief from Compliance with the Obligations Imposed by Chapters 4901, 4903, 4905, 4907, 4909, 4921, and 4923 of the Ohio Revised Code.	)))))))	Case No. 82-1086-GA-ARJ

ENTRY

The Commission, coming now to consider the above-entitled matter, makes the following findings:

1) On August 24, 1982, Yankee Resources, Inc., 6500 Busch Boulevard, Columbus, Ohio 43229, filed an application with the Commission requesting relief from compliance with the obligations imposed by Chapters 4901, 4903, 4905, 4907, 4909, 4921, and 4923 of the Revised Code.

2) Yankee Resources is or anticipates being a party to certain contracts pertaining to the purchase of natural gas from independent Ohio gas producers and from public utilities and the sale of such natural gas from these sources to various entities, including industrial end users, other public utilities, and interstate pipeline companies. Yankee Resources' contracts are or will be those involving Ohio producers' sale of all natural gas produced from specified wells to Yankee Resources, those involving spot purchases from public utilities, and those

involving buyers of natural gas who agree to pay Yankee Resources for the natural gas production described in the purchase contracts. Approximately 90% of the volumes of natural gas transferred by these contracts is purchased by an interstate pipeline company.

3) Yankee Resources receives compensation for its role in locating sellers and buyers and assisting them in their transportation arrangements pursuant to purchase and sale contracts. Management of these contracts is involved in the services which Yankee Resources performs. In short, the services performed are that of a marketer or broker of contracts for natural gas which services typically include taking legal title to the natural gas.

4) Yankee Resources is not affiliated with or under the control of a gas company or a natural gas company engaged in the transportation or distribution of natural gas to consumers. Yankee Resources does not engage in the business of transporting natural gas through pipes or tubing either wholly or partly within this state as it has no physical plant through which natural gas is transported.

5) Sections 4905.03(A)(6), Revised Code, sets forth the definition of a natural gas company as follows:

> A natural gas company, when engaged in the business of supplying natural gas for

> lighting, power, or heating purposes to consumers within this state, or when engaged in the business of supplying natural gas to gas companies or natural gas companies within this state.

6) Section 4905.03(A)(7), Revised Code, defines a pipe-line company as follows:

> A pipe-line company, when engaged in the business of transporting natural gas, oil, or coal or its derivatives through pipes or tubing, either wholly or partly within this state.

7) The Commission is of the opinion that Yankee Resources' activities are not the type which fall under either the definition of a natural gas company or a pipe-line company. Yankee Resources' operations consist of coordinating buyers with sellers of natural gas through certain contractual arrangements and assisting them in making arrangements of transportation of the gas. The applicant owns no physical facilities with which to transport gas. The Commission believes that the marketing or brokering of natural gas contracts is not an activity contemplated by Section 4905.03, Revised Code. Accordingly, the Commission finds that Yankee Resources is not a public utility and is not subject to the obligations imposed by Chapters 4901, 4903, 4905, 4907, 4909,4921, and 4923, Revised Code.

It is, therefore,

ORDERED, That the application of Yankee Resources, Inc. for Relief from Compliance with the Obligations Imposed by Chapters 4901, 4903, 4905, 4907, 4909, 4921, and 4923 of the Revised Code is granted. It is, further,

ORDERED, That a copy of this Entry be served upon Yankee Resources, Inc.

THE PUBLIC UTILITIES COMMISSION OF OHIO

/s/ John Kelly
(Chairman)

/s/ Dennis Pines

/s/ Michael Del Bane
(Commissioners)

BEFORE THE BOARD OF TAX APPEALS
STATE OF OHIO

GENERAL MOTORS CORPORATION General Motors Building 3044 West Grand Boulevard - TX-40 Detroit, MI 48202 Appellant, v.	)	
	)	Case No. 91-K-1558
ROGER W. TRACY, TAX COMMISSIONER OF OHIO State Office Tower 30 East Broad Street - 22nd Fl. Columbus, OH 43266-003- Appellee.	)	(Ohio Use Tax) NOTICE OF APPEAL

General Motors Corporation ("GM") hereby gives notice of appeal to the Ohio Board of Tax Appeals pursuant to R.C. 5717.02 from a final determination of the Tax Commissioner of Ohio ("Commissioner") issued on October 29, 1991. A true copy of the Commissioner's final determination is attached to this notice as Exhibit A and is incorporated herein by reference.

Background

On April 4, 1991, the Commissioner issued to General Motors Corporation, B-O-C Group, an Ohio use tax assessment, serial no. 91004768 U, in the amount of $106,377.11 (including preassessment interest and penalties). The assessment relates to GM's storage, use or other consumption of natural gas in Ohio during the period January 1, 1987 to December 31, 1989, that was purchased from Mobil Natural Gas, Inc. ("MNG"). GM's purchases of natural gas from MNG arise from sales consummated outside the State of Ohio. The natural gas purchased from MNG was delivered to GM into an interstate pipeline at a point outside of Ohio and it was transported to Ohio through an interstate pipeline network and, thereafter, delivered to GM in Ohio through "pipes."

GM timely filed a petition for reassessment objecting to the entire assessment and, alternatively, requesting a remission of the statutory penalties. Following a hearing on the petition, the Commissioner issued his final determination wherein he affirmed the assessment of tax and preassessment interest but conditionally cancelled the penalties in excess of five percent (5%).

Specifications of Error

GM complains of the following errors by the Commissioner in the final determination appealed here:

> 1. The Commissioner erred in failing to find that GM's storage, use or other consumption of natural gas that was subjected to assessment here was exempt from the Ohio use tax by R.C. 5739.02(B)(7), as made applicable to the Ohio use tax by R.C. 5741.02(C)(2), because

it was acquired from a "natural gas company" within the meaning of R.C. 5727.01(E)(4) and delivered to GM in Ohio through "pipes."

2. The Commissioner erred in failing to find that MNG must be considered a "natural gas company" within the meaning of R.C. 5727.01(E)(4) for purposes of determining whether GM's storage, use or other consumption of natural gas that was subjected to assessment here was exempt from the Ohio use tax by R.C. 5739.02(B)(7), as made applicable to the Ohio use tax by R.C. 5741.02(C)(2).

3. The Commissioner erred in finding that no "relevant evidence" was presented to establish that MNG is a "natural gas company" within the meaning of R.C. 5739.02(B)(7), as made applicable to the Ohio use tax by R.C. 5741.02(C)(2).

4. The Commissioner's application here of the Ohio sales and use tax laws, particularly R.C. 5727.01, R.C. 5739.02 and R.C. 5741.02, is proscribed by the Commerce Clause of the United States Constitution because it results in an assessment of Ohio use tax on natural gas purchased outside the State of Ohio and delivered through pipes to consumers in Ohio when natural gas purchased within Ohio and delivered through pipes to consumers in Ohio would not be subjected to an Ohio sales or use tax.

5. The Commissioner's application here of

the Ohio sales and use tax laws, particularly R.C. 5727.01, R.C. 5739.02 and R.C. 5741.02, is proscribed by the Equal Protection Clause of the United States Constitution because it results in an assessment of Ohio use tax on natural gas purchased outside the State of Ohio and delivered through pipes to consumers in Ohio when natural gas purchased within Ohio and delivered through pipes to consumers in Ohio would not be subjected to an Ohio sales or use tax.

6. Assuming, *arguendo*, that GM's storage, use or other consumption of natural gas in issue here is not exempt from Ohio use tax by R.C. 5739.02(B)(7), as made applicable to the Ohio use tax by R.C. 5741.02(C)(2), and, further that the assessment of Ohio use tax here is not proscribed by the Commerce Clause or the Equal Protection Clause of the United States Constitution, Ohio use tax was assessed erroneously on the storage, use or other consumption of natural gas in Ohio that was acquired for use by GM directly in producing tangible personal property for sale by manufacturing or processing. Accordingly, the storage use or other consumption of such natural gas was exempt from the Ohio use tax by R.C. 5739.01(E)(2), as made applicable to the Ohio use tax by R.C. 5741.02(C)(2).

7. Assuming, *arguendo*, that GM's storage, use or other consumption of natural gas in issue here is not exempt from Ohio use tax by either R.C. 5739.01(E)(2) or R.C. 5739.02(B)(7), as made applicable to the Ohio

use tax by R.C. 5741.02(C)(2), and, further that the assessment of Ohio use tax here is not proscribed by the Commerce Clause or the Equal Protection Clause of the United States Constitution, R.C. 5739.133(A)(3) does not authorize the Commissioner to assess a penalty on preassessment interest charged pursuant to R.C. 5739.133(B).

7 [sic]. Assuming, *arguendo*, that GM's storage, use or other consumption of natural gas in issue here is not exempt from Ohio use tax by either R.C. 5739.01(E)(2) or R.C. 5739.02(B)(7), as made applicable to the Ohio use tax by R.C. 5741.02(C)(2), and, further that the assessment of Ohio use tax here is not proscribed by the Commerce Clause or the Equal Protection Clause of the United States Constitution, the Commissioner abused his discretion in failing to remit entirely any penalties assessed pursuant to R.C. 5739.133(A).

Relief Requested

GM requests that this Board issue an order vacating the entire assessment of Ohio use tax appealed here. GM further requests that this Board schedule a hearing on the assessment so that GM might present testimony and evidence in support of the errors alleged herein and as required by R.C. 5717.02 and the decision of the Supreme Court of Ohio in *Cleveland Gear Co. v. Limbach* (1988), 35 Ohio St. 3d 229, *syl.* 3, and that reasonable notice of the hearing be given to GM's attorney.

Respectfully submitted,

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No. 95-1232

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

GENERAL MOTORS CORPORATION,

Petitioner,

v.

ROGER W. TRACY, TAX COMMISSIONER OF OHIO,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Ohio

REPLY OF THE PETITIONER

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REPLY OF THE PETITIONER

The conflict between the decision below and this Court's Commerce Clause precedents, and the importance of this case, are highlighted by Respondent's Brief in Opposition ("Opp.").

1. Respondent claims that GM waived its constitutional arguments as a matter of Ohio law. *See* Opp. 7-11. We are at a loss to understand Respondent's theory of waiver: He admits that GM below urged that discrimination between out-of-State purchases and in-State purchases from local utilities violated the Commerce Clause; that is exactly the same argument GM urges here. Respondent did not urge waiver below, nor could he have done so.[1] In any event, the court below did not rest on any such theory: This Court has made clear that where the highest state court, as here, expressly considers and determines a federal issue, "the Supreme Court does not inquire into the framing of the issue by the litigant in the first instance." R. Stern, *et al.*, SUPREME COURT PRACTICE § 3.16, at 121 (7th ed. 1993); *Saltonstall v. Saltonstall*, 276 U.S. 260, 267-68 (1928).

Even when Respondent does turn to the merits of the decision below (Opp. 11-18), he barely mentions the decision below, and for the most part does not defend the reasoning offered by the Ohio Supreme Court.

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[1] As quoted by Respondent (Opp. 7-8), GM's specification of error before Ohio's Board of Tax Appeals presented precisely the Commerce Clause and Equal Protection Clause issues presented by the Petition. In any event, all that Ohio law requires is a general statement of the legal theory, as Respondent's own cases confirm. *Cleveland Gear Co. v. Limbach*, 520 N.E.2d 188, 192 (Ohio 1988) (specification "that the application of R.C. 5711.16 deprives [appellant] of equal protection of the law in violation of the United States and Ohio Constitutions" held sufficient). Indeed, the Ohio Tax Commissioner has been chided more than once by the Ohio Supreme Court for urging "a hypertechnical reading of the notice [of appeal]." *MCI Telecommunications Corp. v. Limbach*, 625 N.E.2d 597, 599 (Ohio), *cert. denied*, 115 S. Ct. 77 (1994) (*quoting Buckeye Int'l, Inc. v. Limbach*, 595 N.E.2d 347, 350 (Ohio 1992)).

2. In the Petition (Pet. 8-11), GM showed that the supreme court's justification for the constitutionality of the tax exemption — that it favors only some in-State sellers — is squarely in conflict with a long line of this Court's cases, beginning with *Brimmer v. Rebman*, 138 U.S. 78 (1891), which hold that a State may not save a tax from unconstitutionality by favoring only some, but not all, in-State commerce. Respondent relegates these cases to a footnote (Opp. 14 n.4), explaining that in each of these cases, "the imposition of tax depended upon the place of origination or other business activity." (Opp. 14). While that is certainly true, Respondent fails to note that in this case, the exemption from tax also "depend[s] upon the place of origination or other business activity" — the exemption is only available to purchases made from *local* public utilities. The supreme court's decision is in square conflict with the *Brimmer* line of cases.

3. GM also showed (Pet. 11-14) that the supreme court's ruling that GM lacked standing to challenge the constitutionality of the use tax conflicts with several decisions of this Court.[2] Nowhere in Respondent's Brief does he attempt to defend the supreme court's standing ruling. Respondent's silent concession of a conflict on this important issue is yet another confirmation of the untenable nature of the decision below.

4. Rather than defend the decision below, Respondent elects to offer new justifications for the result — justifications not adopted by the Ohio court. The use tax exemption which GM challenges is not, as Respondent claims, "part of a separate system of taxing and regulating natural gas companies and other public utilities." (Opp. 1; *see also* Opp. 6, 10, 16-17) And the Ohio Supreme Court did not so hold. Rather, the use tax is, by its terms, imposed on the *consumers* of goods purchased outside of Ohio (including natural gas) and used within Ohio. Ohio Rev. Code Ann. § 5741.02(A). The exemption at issue here is only

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[2] *E.g., Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 266-67 (1984); *Associated Industries of Mo. v. Lohman*, 114 S. Ct. 1815, 1819 (1994); *West Lynn Creamery, Inc. v. Healy*, 114 S. Ct. 2205, 2209 (1994).

available for natural gas purchases from local public utilities, and is *never* available when the gas is purchased outside the State of Ohio. That is pure discrimination against all interstate commerce in natural gas.

5. Respondent relies heavily on the "fundamentally different nature of the utility business" from the gas marketing business. (Opp. 11-18) While the Commerce Clause certainly allows states to tax different businesses differently in appropriate circumstances, the tax here is not on utility businesses or gas marketers. It is a use tax imposed on consumers of a particular item of interstate commerce — natural gas. Both the taxpayers and the product taxed are identical whether the purchase is made from an out-of-state seller or an in-state public utility. The exemption is constructed to favor only one class of natural gas purchases — those from Ohio-based public utilities. "[D]iscrimination between in-state and out-of-state *goods* is as offensive to the Commerce Clause as discrimination between in-state and out-of-state *taxpayers*." *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 268 n.8 (1984) (emphasis added).

6. There is no authority supporting differential treatment under the circumstances of this case. Respondent's reliance on *Amerada Hess Corp. v. Director, Div. of Taxation*, 490 U.S. 66 (1989) (Opp. 12-13) is plainly misplaced. In that case, this Court upheld New Jersey's Corporation Business Tax as applied to several major oil companies. Each of the companies wished to deduct from its New Jersey taxable income its federal windfall profit taxes on crude oil production (which activities were not associated with New Jersey, but with oil-producing states). The companies argued that by denying the deduction for windfall taxes, the New Jersey tax violated each of the four prongs of the *Complete Auto* Commerce Clause test (*see Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977)). As to the "discrimination" prong of *Complete Auto*, the companies claimed that the tax discriminated "against oil producers who market their oil in favor of independent retailers who do not produce oil," and thus had no windfall profits. *Amerada Hess*, 490 U.S. at 78. This Court said that the companies' argument "miss[es] th[e] essential point" of

the Commerce Clause (*id.* at 77), because state lines were irrelevant to a distinction between producers and retailers. The claimed discrimination rested on "the nature of their businesses," not "the location of their activities," since both producers and retailers "may operate both in New Jersey and outside New Jersey." *Id.* at 78.

Respondent claims that the tax statute here, like the one sustained in *Amerada Hess,* rests simply on "the nature of," not "the location of," the seller. (Opp. 13) But that is not so: Purchases of natural gas from out-of-State public utilities are never exempt from use tax, and Respondent does not claim otherwise. By definition, out-of-state utilities do not "own or operate the transportation and distribution equipment and deliver the natural gas to consumers *in Ohio.*" Pet. App. 3a (emphasis added). The favoring of local interests could not be clearer.

7. Respondent also attempts to defend the discriminatory tax exemption as somehow compensatory for the "gross receipts tax imposed on utilities generally (but not on unregulated gas marketers)." (Opp. 11 n.3, *citing Associated Industries of Mo. v. Lohman,* 114 S. Ct. 1815, 1824-25 (1994); *see also* Opp. 16) The court below did not adopt this reasoning, and the argument evidences a serious misreading of this Court's Commerce Clause precedents. This Court has repeatedly held that to be sustained as valid compensating taxes, the two taxes being compared must "fall on substantially equivalent events." *Fulton Corp. v. Faulkner,* 64 U.S.L.W. 4088 (U.S. Feb. 21, 1996). *See also Associated Industries,* 114 S. Ct. at 1821.

Ohio's gross receipts tax on local public utilities, and its use tax on gas not sold by a local public utility, do not "fall on substantially equivalent events." The two taxes do not even fall on the same entities: The use tax on gas is imposed upon the buyer of gas; the gross receipts tax, on the utility. Ohio Rev. Code Ann. §§ 5741.02(B), 5727.33, 5727.38. However, this Court's decision in *Henneford v. Silas Mason Co.,* 300 U.S. 577 (1937) "makes clear that actual incidence upon the same class of taxpayers is a necessary condition for a finding that two taxes are

complementary." *Fulton Corp.*, 64 U.S.L.W. at 4093 n.6. Furthermore, the rates of taxation are different — 5 to 7% for the use tax, 4.75% for the gross receipts tax. Ohio Rev. Code Ann. §§ 5739.025; 5727.38; *compare Fulton Corp.*, 64 U.S.L.W. at 4093. Respondent's attempt to defend the exemption on this ground demonstrates that he recognizes the presence of discrimination.

8. The decision below has serious ramifications for competition in the natural gas industry. Respondent recognizes (Opp. 11) that "[t]he players in the business of selling natural gas are natural gas marketers and natural gas utilities." These players have been competing in the burner-tip market ever since the "playing field" was deregulated in order to allow non-utility sellers to compete in the burner-tip market with local public utilities. (Pet. 2-3) Nonetheless, the decision below gives the State of Ohio, by its tax code, free rein to tilt that playing field in favor of its own local public utilities. Such parochialism only distorts the national market, and therefore cannot be tolerated under the Commerce Clause.[3]

9. The importance of this case to *all* interstate commerce is illustrated by the Brief *amicus curiae* of The Committee On State Taxation (COST) in support of the Petition. COST, as its *amicus* brief explains, is a nationwide organization of over 400 major corporate taxpayers, giving COST a broad and unique perspective on state tax laws. As COST points out, the issues presented in this case are critical and national in their importance, principally

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[3] This case has also generated an *amicus* brief *opposing* certiorari from Enron Access Corp., a non-utility seller of natural gas. Enron's brief presents no constitutional arguments opposing certiorari, instead arguing points of Ohio law not at issue here. (Enron Br. 3) Ordinarily Enron should be expected to oppose discriminatory taxes upon its customers' purchases. But Enron is nonetheless allied with Respondent in this case because it wishes not to be classified, *for regulatory purposes*, as an Ohio public utility. Enron Br. 1-2 (calling its non-regulation "absolutely crucial" to Enron's interests).

because the tax scheme upheld by the Ohio Supreme Court "impedes purchasers' access to the national market by exempting sales by local businesses, but taxing out-of-state sales." COST Br. 2. The issue is thus important not only to a particular industry, but to the national marketplace as a whole.

10. Finally, the issues presented here are also recurring. Despite Respondent's suggestion to the contrary (Opp. 6), *amicus* COST points out that at least one other state (New York) has tried to implement a similar discrimination. *See* COST Br. 3-4 (discussing *Tug Buster Bouchard Corp. v. Wetzler*, 635 N.Y.S. 2d 803 (N.Y. App. Div. 1996)). The State of Washington, too, has a similar exemption scheme for natural gas purchases which is constitutionally suspect.[4] So does the State of Indiana.[5] Respondent himself predicts "a tidal wave of commerce clause challenges" (Opp. 17-18) if the challenged tax is found unconstitutional. While this is obvious hyperbole on Respondent's part, he plainly concedes that the issues presented here are not unique to Ohio, and will arise in the future.

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[4] The State of Washington imposes a use tax upon "the privilege of using natural gas or manufactured gas within this state as a consumer." Wash. Rev. Code § 82.12.022(1). However, Washington exempts the consumer from use tax "if the person who sold the gas to the consumer has paid a tax under [Wash. Rev. Code §] 82.16.020 with respect to the gas for which exemption is sought." Wash. Rev. Code § 82.12.022(4). The "tax under [Wash. Rev. Code §] 82.16.020" is the gross receipts tax on local public utilities.

[5] Indiana exempts from its generally applicable sales and use tax certain purchases of natural gas from a public utility. Ind. Code § 6-2.5-4-5(c). Identical gas purchased from all other sources is not similarly exempted.

CONCLUSION

For the foregoing reasons, and for those set forth in the Petition and in the brief *amicus curiae* of The Committee On State Taxation, certiorari should be granted.

Respectfully submitted,

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No. 95-1232

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

GENERAL MOTORS CORPORATION,

Petitioner,

v.

ROGER W. TRACY, Tax Commissioner of Ohio,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Ohio

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF COMMITTEE ON STATE TAXATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

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On Petition for a Writ of Certiorari to the Supreme Court of Ohio

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Committee On State Taxation ("COST") hereby respectfully requests leave to file the attached Brief as *Amicus Curiae* in Support of the Petition. COST is a non-profit trade association that was organized in 1969 as an advisory committee to the Council of State Chambers of Commerce. COST, which separately incorporated in 1991, has a membership of over 410 major multistate corporations, engaged in interstate and international business. COST has participated in several state tax cases before this Court, including *Reich v. Collins,* 115 S. Ct. 547 (1994), where COST's *amicus* brief presaged the Court's ultimate ruling. The interest of COST as *amicus curiae* is described in greater detail *infra* at Brief, pp. 1-2.

Counsel for respondent has refused to consent to the filing of a brief in support of petitioner, even though it has consented to the filing of an *amicus* brief in support of respondent.

There are compelling reasons for granting COST's motion. First, with respect to the petition filed in this case, COST wishes to address the Commerce Clause implications of the specific Ohio Supreme Court ruling under review. A full exposition of the controversy and the potential ramifications of this case for other taxpayers will benefit this Court. Indeed, COST is informed that an *amicus* brief *opposing* the petition is to be filed in this case; counsel for both petitioner and respondent have consented to that filing.

Second, the member companies of COST are more generally concerned with the ability of state courts to faithfully apply the constitutional limitations on state taxation in a responsible fashion. COST has monitored such state court decisions for years, and is uniquely qualified to comment on this question.

Wherefore, COST respectfully requests that this Court grant its Motion for Leave to file this brief *amicus curiae.*

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March 4, 1996

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

No. 95-1232

GENERAL MOTORS CORPORATION,

Petitioner,

v.

ROGER W. TRACY, Tax Commissioner of Ohio,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Ohio

BRIEF OF COMMITTEE ON STATE TAXATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

INTRODUCTORY STATEMENT

This brief is submitted by the Committee On State Taxation as *amicus curiae* in support of petitioner General Motors Corporation.

INTEREST OF *AMICUS CURIAE*

The Committee On State Taxation ("COST") is a non-profit trade association that was organized in 1969 as an advisory committee to the Council of State Chambers of Commerce. COST, which separately incorporated on December 11, 1991, has a membership of over 410 major multistate corporations, engaged in interstate and international business. COST's objective is to preserve and promote the equitable and nondiscriminatory state and local taxation of multijurisdictional business entities. In furtherance of that objective, COST has filed *amicus* briefs in

several of this Court's state-tax cases, including *Reich v. Collins*, 115 S. Ct. 547 (1994).

Many of COST's members are engaged in business in the State of Ohio and thus have a particular interest in the ultimate disposition of the use tax exemption scheme at issue in this case. In addition, the entire membership of COST has a vital interest in ensuring that states do not impede, through discriminatory taxes, the rights of all purchasers to engage in commerce in the national market. The Ohio tax scheme at issue in this case, like similar schemes currently in place in other states, impedes purchasers' access to the national market by exempting sales by local businesses, but taxing out-of-state sales. That is precisely the sort of parochial favoritism that COST opposes, and that the Commerce Clause forbids.

STATEMENT

This case involves Commerce Clause and Equal Protection Clause challenges to an Ohio sales and use tax exemption scheme. That scheme encourages buyers to purchase their natural gas requirements locally, by exempting from tax purchases of natural gas from local public utilities while taxing purchases out of state. Petitioner, which purchased its gas requirements outside of Ohio, was therefore required to pay a tax which would not have been assessed had it purchased the identical gas from an Ohio public utility.

REASONS FOR GRANTING THE WRIT

By their very nature, states have a tendency to favor their own industries over those of other states. This Court's decisions illustrate this principle. Recently, Massachusetts decided to favor its milk farmers by funding a subsidy for them out of a tax on all milk sold in that Commonwealth. *See West Lynn Creamery, Inc. v. Healy*, 114 S. Ct. 2205 (1994). Hawaii favored its local liquor producers by exempting particular native beverages from excise tax. *See Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984). Over a century ago, Virginia was favoring its local butchers by requiring stringent inspections of, and imposing fees upon, only

meat imported from afar. *See Brimmer v. Rebman*, 138 U.S. 78 (1891). Each of these examples of state favoritism has one other thing in common: Each was held to violate the Commerce Clause of the United States Constitution.[1]

The questions raised by the Petitioner in this case merit this Court's review for several reasons. For one, the discrimination perpetrated by the Ohio use tax exemption scheme against COST members and other companies engaging in interstate purchases of natural gas for use in their Ohio manufacturing operations would by itself serve as a sufficient ground for granting a writ of certiorari. However, the questions raised in this case transcend the discriminatory impact of an unconstitutional tax on industry operating within one state.

The same sort of mischief worked by the Ohio scheme is present in other states as well. In *Tug Buster Bouchard Corp. v. Wetzler*, 635 N.Y.S.2d 803 (N.Y. App. Div. 1996), the New York Appellate Division struck down New York's petroleum business tax as violative of the Commerce Clause. That tax was imposed only "upon the purchasers and consumers of imported petroleum," *id.* at 805, but not upon purchasers and consumers of petroleum sold by New York businesses. Fortunately, the New York courts — unlike the Ohio court here — recognized the national market guaranteed by the Commerce Clause. The New York tax — where "in-State sellers of domestic petroleum remain benefited while petitioners [purchasers of out-of-state petroleum] and those similarly situated remain burdened" — was held to be unconstitutionally discriminatory. *Id.*[2] We can see no principled

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[1] Such discrimination against out-of-state interests would, as the Petition explains (Pet. 15), also violate the Equal Protection Clause. *See Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985).

[2] The Appellate Division perceived no "standing" problem with petitioners, who were *purchasers* of out-of-state petroleum, raising this Commerce-Clause argument, which highlights the Ohio court's further error in this regard. *See* Pet. App. 4a; Pet. 11-14.

distinction to be drawn between *Tug Buster Bouchard* and the present case.

There are also striking similarities between this case and the discriminatory state tax scheme recently struck down by this Court in *Fulton Corp. v. Faulkner*, 64 U.S.L.W. 4088 (U.S. Feb. 21, 1996). There, North Carolina tried to give its own corporations a similar "home-field" advantage. The more of the corporation's business that was done in North Carolina, the less the stock was taxed. A unanimous Court concluded that "[t]here is no doubt that the intangibles tax facially discriminates against interstate commerce." *Id.* at 4091. *Even "[t]he Secretary [of Revenue] practically concede[d] as much."* *Id.* (emphasis added). Just as in *Fulton Corp.*, the tax exemption scheme at issue here favors only those who keep their business in-state; just as in *Fulton Corp.*, the decision here should not be permitted to stand.[3]

The Ohio Supreme Court's decision has serious potential to distort the national market for the sale of all goods, not just natural gas. The Commerce Clause, and to a similar extent the Equal Protection Clause, guarantees both merchants and buyers that state borders will be largely irrelevant to purchasing decisions. Thus, a buyer such as GM in this case should be assured that a taxing state will tax its purchases of goods *without regard* to where that purchase is made. But here, since GM did not purchase its natural gas requirements from a favored Ohio public utility, it paid a hefty tax. That unvarnished "home-field"

---

[3] It is also worth noting that the Court's decision in *Fulton Corp.* conflicts with the Ohio court's bizarre "standing" ruling. (*See* Pet. 11-14) The petitioner in *Fulton Corp.* was a corporation which owned stock in out-of-state corporations. Neither the North Carolina courts, nor this Court, even paused to consider whether Fulton Corporation had "standing" to challenge a law which drew distinctions based on the residence of the *issuers* of the stock certificates, not the *owners* (such as Fulton). 64 U.S.L.W. at 4089-90.

advantage is unconstitutional discrimination worthy of this Court's review.

COST believes that the most significant aspect of this case lies not in the existence of a plethora of identical or similar use tax exemption schemes for natural gas in other states, but in its jurisprudential justification for discriminatory state tax schemes that favor in-state commerce to the detriment of interstate commerce. Analogous exemption and taxation schemes that favor in-state commerce over interstate commerce have been overturned by this Court in many Commerce Clause decisions. Such decisions leave no room for discrimination, yet state courts persist in attempting to carve out exceptions for their own transgressor statutes. Here, the Supreme Court of Ohio held that the placement of a degree of burden on *some* in-state purchases of natural gas somehow neutralizes the comprehensive burden on *all* interstate purchases of gas. This Court cannot tolerate such a result without permitting the enervation of a critical line of Commerce Clause jurisprudence.

Because the Tax Injunction Act, 28 U.S.C. § 1341 (1994), bars relief to taxpayers in federal court, state tax cases as a practical matter can only be litigated in state court. These state courts are often unsympathetic to federal constitutional challenges to important sources of state revenue. Based on the long experience of COST and its members in this area, decisions such as this — if left unreviewed — will encourage Ohio and other states to disregard the Commerce Clause in a wide variety of contexts.

CONCLUSION

For the reasons set forth above, the Committee On State Taxation respectfully requests that the Court grant a writ of certiorari and reverse the decision of the Supreme Court of Ohio.

Respectfully submitted,

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March 4, 1996

Supreme Court, U.S.
FILED
MAR 4 1996
CLERK

No. 95-1232

In The

Supreme Court of the United States

October Term, 1995

GENERAL MOTORS CORPORATION,

Petitioner,

v.

ROGER W. TRACY, TAX COMMISSIONER OF OHIO,

Respondent.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Ohio

BRIEF AMICUS CURIAE OF ENRON ACCESS CORPORATION IN SUPPORT OF RESPONDENT

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March 4, 1996

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BRIEF AMICUS CURIAE OF ENRON ACCESS CORPORATION IN SUPPORT OF RESPONDENT

Amicus Curiae, Enron Access Corporation ("Enron Access"), hereby requests that the petition for a writ of certiorari to review the judgment of the Supreme Court of Ohio sought by Petitioner, General Motors Corporation ("General Motors"), be denied.

STATEMENT AND INTEREST OF AMICUS CURIAE

General Motors contends that natural gas purchased from an unregulated natural gas marketer and used in Ohio is exempt from Ohio sales and use tax because the gas is purchased from a "natural gas company." The Ohio Supreme Court determined that an unregulated natural gas marketer is not a "natural gas company" under Ohio law, and therefore gas purchased from an unregulated gas marketer is not exempt from Ohio sales and use tax. *General Motors Corp. v. Tracy*, 652 N.E.2d 188 (Ohio 1995).

General Motors has petitioned for a writ of certiorari to review the decision of the Ohio Supreme Court. Enron Access Corporation opposes the petition of General Motors. The interest of Enron Access in opposing General Motors arises because the decision of the Ohio Supreme Court is based squarely on the determination of the court that the term "natural gas company" under Ohio law refers only to a regulated public utility, and not to an unregulated natural gas marketer. This distinction between a regulated public utility and an unregulated natural gas marketer is absolutely crucial to the existence

of Enron Access, which is able to provide competitively priced gas to its customers for the very reason that it is not a "natural gas company" and is not subject to the pricing control and regulatory requirements applicable to public utilities. Enron Access therefore has a vital interest that the decision of the Ohio Supreme Court recognizing the distinction not be reviewed.

SUMMARY OF REASONS WHY WRIT SHOULD BE DENIED

An unregulated natural gas marketer such as Enron Access is not a "natural gas company" under Ohio law, and the Ohio Supreme Court correctly determined that purchases of natural gas by General Motors from unregulated natural gas marketers do not qualify for the exemption from Ohio sales and use tax granted for purchases of natural gas from a "natural gas company." The constitutional challenge raised by General Motors below was rejected by the Ohio Supreme Court, which correctly determined that denial of the exemption for purchases from an unregulated marketer (which does not own transportation or distribution facilities) does not violate the Commerce Clause or the Equal Protection Clause of the United States Constitution.

REASONS WHY WRIT SHOULD BE DENIED

Enron Access has been engaged in the business of purchasing and selling natural gas since 1982. Enron

Access does not own or control any natural gas transportation facilities, and Enron Access purchases and sells natural gas solely by contract with its customers, unregulated by any local, state or federal public utility authority. Enron Access and other similar unregulated natural gas marketers are clearly distinct from regulated public utilities which own transportation and distribution facilities and which sell natural gas to the general public.

Enron Access is one of several private gas marketers which sold natural gas to Petitioner General Motors during the years involved in this case. The Supreme Court of Ohio in its opinion in this case, and in its opinion in the companion case of *Chrysler Corp. v. Tracy*, 652 N.E. 2d 185 (Ohio 1995), determined that Enron Access is not a "natural gas company" as defined in Ohio Revised Code § 5727.01(E)(4), and therefore natural gas sold by Enron Access to a consumer such as Chrysler or General Motors does not qualify for exemption from Ohio sales and use tax under Ohio Revised Code §§ 5739.02(B)(7) and 5741.02(C)(2).

The decisions of the Supreme Court of Ohio in this case and in *Chrysler* are correct. Enron Access is not a "natural gas company" under Ohio law, and sales of natural gas by Enron Access to consumers are not exempt from Ohio sales and use tax under Ohio Revised Code § 5739.02(B)(7). Ohio law which imposes sales and use tax on gas sold by unregulated natural gas marketers, and which exempts gas sold by regulated public utilities from sales and use tax, is based on fundamental differences between unregulated natural gas marketers and regulated public utilities. This distinction is reasonable and facilitates the operation of the business of Enron Access

and all unregulated natural gas marketers, and therefore must be upheld.

The arguments presented by General Motors in its Petition as to the Commerce Clause and the Equal Protection Clause of the United States Constitution cannot be sustained in light of the holding of the Supreme Court of Ohio. General Motors' Petition provides no basis for granting a writ of certiorari. The response of the Tax Commissioner of Ohio to General Motors' Petition refutes the constitutional arguments of General Motors. Enron Access adopts the arguments presented by the Tax Commissioner, and strongly supports the position of the Tax Commissioner that General Motors' Petition should not be granted.

CONCLUSION

For the foregoing reasons, this Court should deny General Motors' petition for a writ of certiorari.

Respectfully submitted,

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March 4, 1996

Supreme Court, U.S.
FILED
MAY 16 1996
CLERK

No. 95-1232

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

GENERAL MOTORS CORPORATION,
Petitioner,

v.

ROGER W. TRACY, TAX COMMISSIONER OF OHIO,
Respondent.

On Writ of Certiorari to the Supreme Court of Ohio

JOINT APPENDIX

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Petition for Certiorari Filed February 1, 1996
Certiorari Granted April 1, 1996

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I. BEFORE THE TAX COMMISSIONER OF OHIO

1.	6/18/91	Three notices of assessment issued by Tax Commissioner regarding three of General Motors' operating divisions
2.	7/11/91	General Motors' petitions for reassessment
3.	8/16/91	Hearing Before Tax Commissioner on the petitions
4.	10/29/91	Tax Commissioner's Final Determinations issued on the petitions

II. BEFORE THE OHIO BOARD OF TAX APPEALS

A. *General Motors Corporation v. Tracy*, Board of Tax Appeals Case No. 91-001558

1.	12/2/91	Notice of Appeal
2.	5/12/93 and 5/14/93	Testimony Before Hearing Examiner Bradford Arnold
3.	7/9/93	Appellant's Brief filed
4.	12/29/93	Appellee's Brief filed
5.	1/28/94	Appellant's Reply Brief filed
6.	2/7/94	Brief of *Amicus Curiae* Enron Access Corp. in support of appellee filed
7.	2/10/94	Motion for Leave to File Brief *Amicus Curiae* for Enron Access Corp. in support of appellee granted
8.	2/25/94	Decision of Ohio Board of Tax Appeals

B. *General Motors Corporation v. Tracy*, Board of Tax Appeals Case No. 92-000146

1. 12/2/91	Notice of Appeal
2. 5/12/93 and 5/14/93	Testimony Before Hearing Examiner Bradford Arnold
3. 7/9/93	Appellant's Brief filed
4. 12/29/93	Appellee's Brief filed
5. 1/28/94	Appellant's Reply Brief filed
6. 2/7/94	Brief of *Amicus Curiae* Enron Access Corp. in support of appellee filed
7. 2/10/94	Motion for Leave to File Brief *Amicus Curiae* for Enron Access Corp. in support of appellee granted
8. 2/25/94	Decision of Ohio Board of Tax Appeals

C. *General Motors Corporation v. Tracy*, Board of Tax Appeals Case No. 92-000510

1. 12/2/91	Notice of Appeal
2. 5/12/93 and 5/14/93	Testimony Before Hearing Examiner Bradford Arnold
3. 7/9/93	Appellant's Brief filed
4. 12/29/93	Appellee's Brief filed
5. 1/28/94	Appellant's Reply Brief filed
6. 2/7/94	Brief of *Amicus Curiae* Enron Access Corp. in support of appellee filed
7. 2/10/94	Motion for Leave to File Brief

		Amicus Curiae for Enron Access Corp. in support of appellee granted
	8. 2/25/94	Decision of Ohio Board of Tax Appeals

III. BEFORE THE THE SUPREME COURT OF OHIO

A. *General Motors Corporation, Packard Division v. Roger W. Tracy, Tax Commissioner of Ohio*, Supreme Court of Ohio Case No. 94-0642

	1. 03/28/94	Notice of appeal by General Motors Corp. filed
		Amended notice of appeal filed
		Demand for certified transcript filed
	2. 03/30/94	Motion to consolidate case with 94-643 and 94-644 filed
	3. 07/25/94	Appellant's merit brief filed
		Supplement to briefs filed
	4. 09/13/94	Brief of *Amicus Curiae* by Enron Access Corp. in support of appellee filed
		Appellee's merit brief filed
	5. 10/03/94	Reply brief filed
	6. 04/25/95	Oral Argument held
	7. 08/09/95	Decision affirmed
	8. 08/21/95	Motion for Reconsideration filed
	9. 08/28/95	Memo opposing motion for reconsideration filed
	10. 10/04/95	Motion for reconsideration denied and certified copy of judgment entry

sent to clerk. Issuance of Mandate and copy of rehearing entry sent to clerk

11. 02/09/96 — Notice of filing petition for certiorari in U.S.S.C. filed

12. 04/05/96 — Notice of U.S.S.C. granting of petition for writ of certiorari filed

B. *General Motors Corporation v. Roger W. Tracy, Tax Commissioner of Ohio*, Supreme Court of Ohio Case No. 94-0643

1. 03/28/94 — Notice of appeal by General Motors Corp. filed

Amended notice of appeal filed

Demand for certified transcript filed

2. 03/30/94 — Motion to consolidate case with 94-642 and 94-644 filed

3. 07/25/94 — Appellant's merit brief filed

Supplement to briefs filed

4. 09/13/94 — Brief of *Amicus Curiae* by Enron Access Corp. in support of appellee filed

Appellee's merit brief filed

5. 10/03/94 — Reply brief filed

6. 04/25/95 — Oral Argument held

7. 08/09/95 — Decision affirmed

8. 08/21/95 — Motion for Reconsideration filed

9. 08/28/95 — Memo opposing motion for reconsideration filed

10.	10/04/95	Motion for reconsideration denied and certified copy of judgment entry sent to clerk. Issuance of Mandate and copy of rehearing entry sent to clerk
11.	02/09/96	Notice of filing petition for certiorari in U.S.S.C. filed
12.	04/05/96	Notice of U.S.S.C. granting of petition for writ of certiorari filed

C. *General Motors Corporation v. Roger W. Tracy, Tax Commissioner of Ohio*, Supreme Court of Ohio Case No. 94-0644

1.	03/28/94	Notice of appeal by General Motors Corp. filed
		Amended notice of appeal filed
		Demand for certified transcript filed
2.	03/30/94	Motion to consolidate case with 94-642 and 94-643 filed
3.	07/25/94	Appellant's merit brief filed
		Supplement to briefs filed
4.	09/13/94	Brief of *Amicus Curiae* by Enron Access Corp. in support of appellee filed
		Appellee's merit brief filed
5.	10/03/94	Reply brief filed
6.	04/25/95	Oral Argument held
7.	08/09/95	Decision affirmed
8.	08/21/95	Motion for Reconsideration filed
9.	08/28/95	Memo opposing motion for

reconsideration filed

10. 10/04/95 — Motion for reconsideration denied and certified copy of judgment entry sent to clerk. Issuance of Mandate and copy of rehearing entry sent to clerk

11. 02/09/96 — Notice of filing petition for certiorari in U.S.S.C. filed

12. 04/05/96 — Notice of U.S.S.C. granting of petition for writ of certiorari filed

IV. BEFORE THE SUPREME COURT OF THE UNITED STATES

1. 02/01/96 — Petition for Certiorari filed

2. 04/01/96 — Petition for Certiorari granted

THE PUBLIC UTILITIES COMMISSION OF OHIO

GEORGE V. VOINOVICH
GOVERNOR

CRAIG A. GLAZER
CHAIRMAN

The below-signed Secretary or Acting Secretary, duly appointed and qualified official of the Public Utilities Commission of Ohio, in whose custody the books, papers, records, documents and files of said Commission are kept, certifies that the attached is a full, true, correct and complete copy of:

Case No. 82-1086-GA-ARJ

APPLICATION

IN THE MATTER OF THE APPLICATION OF YANKEE RESOURCES, INC., 6500 BUSCH BOULEVARD, COLUMBUS, OHIO 43229 FOR RELIEF FROM COMPLIANCE WITH THE OBLIGATIONS IMPOSED BY CHAPTER 4901, 4903, 4905, 4907, 4909, 4921, 4923, and 4925 OF THE OHIO REVISED CODE.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the official seal of the Public Utilities Commission of Ohio, this 23 day of June, 1992.

/s/ Gary E. Vigorito
Gary E. Vigorito, Secretary
Public Utilities Commission of Ohio

[Seal]

Patricia M. Angel, Acting Secretary
Ronald D. Rose, Acting Secretary
Public Utilities Commission of Ohio

Secretary: Gary E. Vigorito
Upon Assignment,
Acting Secretary: Patricia M. Angel
Ronald D. Rose

[Received Aug. 24, 1982]

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Yankee Resources, Inc., 6500 Busch Boulevard, Columbus, Ohio 43229 For Relief from Compliance with the Obligations Imposed by Chapter 4901, 4903, 4905, 4907, 4909, 4921, 4923, and 4925 of the Ohio Revised Code	)	Case No. 82-1086-GA-ARJ

APPLICATION

NOW COMES Yankee Resources, Inc. (Applicant) and respectfully requests the Honorable Public Utilities Commission of Ohio (Commission) to review Applicant's circumstances with respect to Applicant's ownership of contracts involving the purchase and sale of natural gas and to make a determination as to whether it is a public utility, a natural gas company or a pipeline company as defined by Sections 4905.02, 4905.03(A)(6), or (4)(7) of the Ohio Revised Code (R.C.). If the Commission so determines that Applicant is a public utility, Applicant requests the Commission to grant it the relief from obligations imposed by R.C. Chapters 4901, 4903, 4905, 4907, 4909, 4921, 4923 and 4925.

1. Applicant is an entity which is or anticipates being a party to certain contracts pertaining to the purchase of natural gas from independent Ohio gas producers and from public utilities and the sale of such natural gas from these sources to various entities, including industrial end users, other public utilities and interstate pipeline companies.

Applicant's contracts are or will be of several types: (a) those involving Ohio producers' sale of all natural gas produced from specified wells to Applicant; (b) spot purchases from public utilities; (c) those involving buyers of natural gas who agree to pay Applicant for the natural gas production described in the purchase contracts. Approximately 90% of the volume of natural gas transferred by these contracts is purchased by an interstate pipeline company.

Applicant receives compensation for its role in locating sellers and buyers and assisting them in their transportation arrangements pursuant to purchase and sale contracts. Management of these contracts is involved in the services which Applicant performs. In short, Applicant performs the services of a marketer of contracts for natural gas which services typically include taking legal title to the natural gas.

2. Applicant is not affiliated with, or under the control of a gas company or a natural gas company engaged in the transportation or distribution of natural gas; nor does Applicant engaged in the distribution of natural gas to consumers; nor does Applicant engage in the business of transporting natural gas through pipes or tubing either wholly or in part within the State of Ohio. Applicant has no physical plant through which natural gas is transported. Applicant does not intend to drill wells or become a producer itself.

3. Applicant does not, and never has, held itself out to serve the public.

4. Applicant does not contemplate arranging for the sale of natural gas from all of the contracts which it owns or manages to a single natural gas distribution company.

Some of the parties purchasing natural gas pursuant to the contracts owned and managed by Applicant are located outside the State of Ohio.

5. Applicant's activities with respect to owning and managing contracts are consistent with the state policy to promote Ohio natural gas production. These activities present no threat of

unjust competition to regulated natural gas companies because natural gas supplies flowing into Ohio appear to be overwhelmingly controlled by regulated natural gas distribution companies which have the vast resources to contract with independent producers.

Further, these activities are consistent with the "self-help" program, initiated by the Commission several years ago whereby independent producers and industrial customers were encouraged to enter into natural gas purchase agreements with each other and to arrange for the transportation of such natural gas through the pipelines of regulated natural gas pipelines of Ohio regulated natural gas companies.

6. Applicant's view is that these activities in no way subject it to Commission regulation as contemplated by R.C. Chapter 4905. The statutes and meager case law which exists support the conclusion that Applicant's role as described in the preceding paragraphs do not qualify it as a public utility, a natural gas company, or a pipeline company pursuant to the terms of R.C. Sections 4905.02, 4905.03(A)(6) or 4905.03(A)(7) respectively.

However, should the Commission determine that Applicant is a public utility, Applicant respectfully requests relief from the obligations of R.C. Chapters 4901, 4903, 4905, 4907, 4909, 4921, 4923 and 4925.

WHEREFORE, Applicant respectfully requests the Honorable Commission to determine that it is not a public utility pursuant to R.C. Sections 4905.02, 4909.03(A)(6), or 4905.03(A)(7). In the alternative, in the event the Commission finds that Applicant is a natural gas company public utility, to relieve it from the obligations of R.C. Chapters 4901, 4903, 4905, 4907, 4909, 4921, 4923 and 4925.

Respectfully submitted on behalf of
Yankee Resources, Inc.

By /s/ Sally W. Bloomfield
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Its Attorneys

Of Counsel:
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BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Yankee Resources, Inc., For Relief from Compliance with the Obligations Imposed by Chapter 4901, 4903, 4905, 4907, 4909, 4921, and 4923 of the Ohio Revised Code	))))))))	Case No. 82-1086-GA-ARJ

ENTRY

(Found in Appendix to Respondent's Brief in Opposition at 2a-5a)

STATE OF DELAWARE

OFFICE OF SECRETARY OF STATE

I, MICHAEL HARKINS, SECRETARY OF STATE OF THE STATE OF DELAWARE DO HEREBY CERTIFY THE CERTIFICATE OF OWNERSHIP OF THE YANKEE GAS COMPANY, A CORPORATION ORGANIZED AND EXISTING UNDER THE LAWS OF THE STATE OF DELAWARE, MERGING YANKEE INTERNATIONAL COMPANY AND YANKEE RESOURCES, INC. CORPORATIONS ORGANIZED AND EXISTING UNDER THE LAWS OF THE STATE OF DELAWARE, YANKEE PIPELINE COMPANY A CORPORATION ORGANIZED AND EXISTING UNDER THE LAWS OF THE STATE OF TEXAS, PURSUANT TO SECTION 253 OF THE GENERAL CORPORATION LAW OF THE STATE OF DELAWARE, WAS RECEIVED AND FILED IN THIS OFFICE THE FIRST DAY OF MARCH, A.D. 1988, AT 5:31 O'CLOCK A.M.

AND I DO HEREBY FURTHER CERTIFY THAT THE AFORESAID CORPORATION SHALL BE GOVERNED BY THE LAWS OF THE STATE OF DELAWARE.

/s/ Michael Harkins
Michael Harkins, Secretary of State

[Seal]
758278118

AUTHENTICATION: 11880667
DATE: 10/04/1988

SECRETARY OF THE STATE OF OHIO

(Please return this form to the Secretary of State's Office, 30 East Broad St., Columbus, OH 43215)

By: _____
Date: _____
Amount: _____

Annual Statement of Proportion of Capital Stock
See Section 1703.07, Ohio Revised Code

1988 Form 7 3/31, 1988

The Yankee Gas Company, a corporation organized under the laws of Delaware, with its principal, office at 425 Metro Place South Dublin Ohio 43017 and its Ohio office located at 655 Metro Place South Dublin Ohio 43017, having assets in Ohio located in the counties of Summit, and having assets located without the State at Virginia, in compliance with Section 1703.07 of the Ohio Revised Code makes the following statement:

1. Said corporation holds license No. 659137, issued on 7/22, 1985

2. Said corporation purpose is Natural gas marketing and distribution

3. The report is made as of 6/30/87, which is the date of the ending of the corporation's accounting period in the preceding calendar year. (See Note No. 2 on reverse side).

4. The book value (exclude goodwill) of Ohio assets is 3,774,414

   (See Note No. 4 on reverse side).

5. Amount of business transacted in Ohio last year was 169,533

   Sums of Items 4 and 5 3,944,007

6. Book value (exclude goodwill) of all assets is 26,521,127

7. Total business transacted in last year was 179,659

Sums of Items 6 and 7 26,700,786

8. a. Number of Authorized shares c/s 8,000 p/s 21,000

b. Number of issued shares c/s 1,170 p/s 1,432

DO NOT USE THIS SPACE

Issued Shares	_____	Decimal	_____
Present Prop.	_____	Prior Prop.	_____
Increase	_____	Fee Due	_____
Penalty (15%)	_____	TOTAL	_____

9. Notice of fees due may be mailed to c/o The Yankee Companies, Inc. 400 Atlantic Ave., Boston, MA----------

10. Corporation's statutory agent in Ohio is Prentice Hall Corp. Systems, Inc.

Agent's address is [addressed crossed out]

[illegible]

(Signed) /s/ [illegible]
/s/ [illegible]
(Name and Title of officer signing)

GAS PURCHASE CONTRACT
BETWEEN
MOBIL NATURAL GAS, INC.
AS SELLER
AND
GENERAL MOTORS CORPORATION
AS BUYER

DATED: June 1, 1988

GM INQUIRY # 19-88

Firm

Revised Sept. 15, 1987

THIS CONTRACT, made and entered into this 1st day of June, 1988, by and between ~~Mobil Oil Corporation~~ Mobil Natural Gas Inc. a New York corporation with offices at 11 Greenway Plaza, Suite 2500, Houston, TX 77046 (hereinafter called "Seller"), and General Motors Corporation, a Delaware corporation with offices at 1829 Hallock-Young Road, Warren, Ohio 44481 (hereinafter called "Buyer").

W I T N E S S E T H:

WHEREAS, a program exists under which Buyer may acquire natural gas by the purchase thereof from Seller and provide for the delivery of such gas to its facilities through natural gas pipelines; and

WHEREAS, Seller owns, controls or has the right to sell and dispose of natural gas to be produced from certain oil and gas leaseholds, or has contracted with others to purchase natural gas with the right to sell and dispose of such gas; and

WHEREAS, Seller's supply of natural gas is located in areas served by the initial receiving natural gas pipeline(s) identified in Exhibit A; and

WHEREAS, Seller has heretofore constructed the necessary gathering system and appurtenant facilities or made the necessary arrangements to gather, deliver and sell natural gas to Buyer; and

WHEREAS, Buyer owns and operates facilities at locations identified in Exhibit B and desires to purchase from Seller quantities of natural gas not to exceed the quantities identified in Exhibit C for use at such facilities, and Seller desires to sell such quantities of natural gas to Buyer at the price and upon the terms and conditions hereinafter stated; and

WHEREAS, all of the natural gas purchased by Buyer hereunder will be delivered by Seller into the initial receiving natural gas pipeline(s) identified in Exhibit A, and Buyer intends to have in place gas transportation contract(s) with the initial receiving natural gas pipeline(s) and any other natural gas

pipeline(s) identified in Exhibit A necessary to transport such gas to Buyer's facilities; and

WHEREAS, a true copy of the aforesaid gas transportation contract(s) will be delivered to Seller;

NOW THEREFORE, the parties hereto, each in consideration of the covenants and agreements of the other, hereby mutually covenant and agree as follows:

ARTICLE I

DEFINITIONS

1. Except where the context expressly states another meaning, the following terms when used in this Contract shall have the following meanings:

(a) Bcf means one billion (1,000,000,000) cubic feet of gas;

(b) British Thermal Unit or Btu — The term "Btu" shall mean the amount of heat that must be added to one pound (avoirdupois) of pure water to raise its temperature from 58.5° Fahrenheit to 59.5° Fahrenheit under standard pressure conditions as set forth at Page 158 of the AGA Measurement Manual copyright date 1963.

(c) Contract Year means in respect of the first contract year, a period of time beginning at 8:00 o'clock a.m. on the day and month specified on Exhibit C and continuing through 7:59 o'clock a.m. on the day and month specified on Exhibit C; for each successive contract year, a period of twelve (12) consecutive months, commencing with the end of the preceding contract year;

(d) Cubic Foot of Gas — The volume of gas which occupies one (1) cubic foot when such gas is at a temperature of sixty degrees (60°) Fahrenheit and at a pressure base of fourteen and seventy-three hundredths (14.73) psia saturated.

(e) Day — A period of twenty-four (24) consecutive hours beginning at 8:00 a.m. local time.

(f) Gas; Natural Gas — Natural gas produced from oil wells or gas wells, of the quality specified in Article VI hereof.

(g) Gas Transportation Contract — Contract between GM or its agent or other representative and a natural gas pipeline providing for the transport of gas to be sold hereunder.

(h) Including — A term which means including but not limited to.

(i) Initial receiving pipeline — The pipeline into which gas is first delivered by Seller for Buyer's account.

(j) Maximum Annual Quantity — The maximum quantity of gas that Seller is required to deliver for Buyer's account in a given Contract Year, as set forth in Exhibit C.

(k) Maximum Daily Quantity — The maximum quantity of Gas that Seller is required to deliver for Buyer's account in a given day as set forth in Exhibit C.

(*l*) Maximum Monthly Quantity — The maximum quantity of Gas that Seller is required to deliver to Buyer in a given month, as set forth in Exhibit C.

(m) Mcf — One thousand (1,000) cubic feet of gas.

(n) MMBtu — One million (1,000,000) British thermal units.

(o) Month — The period beginning at 8:00 a.m. local time on the first day of a calendar month and ending at 8:00 a.m. local time on the first day of the following calendar month.

(p) Natural Gas or Gas shall mean, as the context may require, either natural gas obtained from wells or the residue remaining after the natural gas has been treated for the removal of water, hydrocarbon compounds heavier than methane or contaminants as may be required to be compatible with the initial receiving pipeline transportation specifications.

(q) NGPA — The Natural Gas Policy Act of 1978 and the rules and regulations promulgated thereunder.

(r) Pipeline; Natural Gas Pipeline — The interstate pipeline(s), intrastate pipeline(s), and/or local distribution company(ies) identified as Exhibit A.

(s) Psia — Pounds per square inch absolute.

(t) Point of Delivery or "Delivery Point" means, in respect of gas delivered by Seller for Buyer's account hereunder, any of the points described under Exhibit A-1.

ARTICLE II

INITIAL PROCEDURE

1. Seller agrees that it shall, in the exercise of due diligence, file for all governmental consents and authorizations, if any, necessary for Seller to sell gas for Buyer's account and to deliver such gas to initial receiving pipeline for Buyer's account in accordance with the terms and provisions hereof. Seller, or its agent, will be responsible for making all arrangements necessary to transport and deliver gas to the point(s) of delivery.

2. Buyer agrees that it shall, in the exercise of due diligence, file for or cause to be filed for all governmental consents and authorizations, if any, necessary for Buyer to purchase and receive gas or to have gas received for its account hereunder. Buyer further agrees that it shall, in the exercise of due diligence, install or cause to be installed any facilities not already in place necessary to receive deliveries of gas under this Contract. Buyer will be responsible for making all arrangements necessary to receive and transport gas from the point(s) of delivery.

3. Buyer and Seller acknowledge and agree that Buyer's and Seller's obligations under this Contract are conditional upon the following:

(a) Seller, or its agent, having concluded satisfactory transportation contracts with appropriate pipeline companies to enable transport of gas from the production or acquisition point(s) to the point(s) of delivery.

(b) Buyer, having concluded satisfactory transportation contracts with appropriate pipeline companies to enable receipt of gas at the point(s) of delivery and redelivery to Buyer's facilities identified in Exhibit B.

(c) Buyer, Seller and the initial receiving pipeline maintaining all governmental and regulatory approvals, if any, necessary for Buyer to purchase and receive gas hereunder and for Seller to sell to Buyer and deliver such gas in accordance with the terms and provisions hereof.

(d) Buyer and Seller maintaining all necessary transportation contracts to enable the delivery and receipt of gas.

4. While the conditions in paragraph 3 above remain satisfied, then deliveries of gas under this Contract shall commence within seven (7) days or by another date mutually agreeable in writing, after Seller is notified by both the initial receiving pipeline and Buyer that each is ready to receive the gas and shall thereafter continue during the term hereof in keeping with the terms and provisions of this Contract. If deliveries have not commenced within seven days or by another date mutually agreeable in writing after the initial satisfaction of condition (a) through (d) inclusive in Article II, paragraph 3, and Seller is notified by the initial receiving pipeline that is ready to receive the gas, or if either party shall therefore fail to maintain all necessary contracts and approvals including those in (a) through (d) inclusive in Article II, paragraph 3, either Buyer or Seller may terminate this Contract by giving seven days written notice of such termination to the other party, and thereafter neither party shall have any further obligation to the other whatsoever.

ARTICLE III

SALE AND PURCHASE

Subject to the terms and conditions herein, Seller will sell to Buyer and deliver, and Buyer will purchase from Seller and pay for and cause to be taken a quantity of gas equal to the lesser of (a) the Maximum Annual Quantity identified in Exhibit C or (b) the actual gas usage of Buyer's facilities identified in Exhibit B.

ARTICLE IV

QUANTITY AND TRANSPORTATION

1. Buyer shall notify Seller in writing, not less than ten (10) days prior to the first day of each month during the term of this Contract, of the daily and monthly quantities of gas Buyer proposes to purchase from Seller hereunder during such month, it being understood and agreed, however, that without the prior consent of Seller, neither the daily nor the monthly quantity of gas that Buyer may order or Seller shall be required to make available to Buyer on any day or month shall exceed, respectively, the Maximum Daily Quantity or the Maximum Monthly Quantity set forth by month in Exhibit C. Buyer shall give Seller at least 24 hours notice prior to any proposed change of a daily quantity from that set forth in the nomination provided for in Section 1 of this Article IV. Seller may waive such notice upon request if, in its judgment, conditions permit such waiver. Seller shall notify Buyer of any changes in daily deliveries to initial receiving pipeline for the account of Buyer. The notification required by the prior two sentences shall be made by telephone or other instant communication immediately upon knowledge thereof. Variations by Seller of actual deliveries to initial receiving pipeline for the account of Buyer shall be kept to the minimum permitted by operating conditions, and shall be balanced as soon as practicable.

2. The Maximum Annual Quantity under this Contract are listed on Exhibit C (subject to other provisions of this Contract). In subsequent Contract years, if any, Buyer may increase or decrease the Maximum Annual Quantities by giving written notice thereof to Seller 60 days prior to the beginning of the next Contract Year preceding the year in which the change is to occur. The increase or decrease shall be subject to the approval of Seller. Failure of Seller to respond to Buyer's notice providing for an increase or decrease of the then Current Year Maximum Annual Quantity within 30 days shall be deemed to be acceptance thereof. Whenever the Maximum Annual Quantity is changed, a corresponding change in Maximum Daily Quantity and in the

Maximum Monthly Quantity will be made with the mutual consent of both Buyer and Seller, and a change may similarly be made in Exhibit B to the extent the change in Maximum Annual Quantities are due to a change in the facilities to be served.

3. Sixty (60) days prior to any subsequent Contract Year, if any, Buyer shall provide Seller with a nonbinding estimate of the quantity of gas which Buyer wishes to purchase from Seller during each month of the next Contract Year. And Seller shall, within thirty (30) days thereafter, provide Buyer with a price at which it is willing to sell gas to Buyer hereunder in such Contract Year. If Buyer accepts or does not reject such price within fifteen (15) days thereafter, the contract shall continue for such Contract Year at the price provided by Seller. If Buyer rejects such price, this contract will expire at its termination date and thereafter, or after any earlier termination date, neither party shall have any further obligation to the other whatsoever, except for payments (calculated at the applicable contract price) due or that thereafter become due for gas delivered prior to the termination date, or required to be delivered after the termination date to the initial receiving pipeline to make up for imbalances occurring prior to the termination date.

4. The gas sold and purchased hereunder is to be utilized by Buyer at its facilities identified in Exhibit B. Said Gas will be delivered by Seller for Buyer's account to the Point(s) of Delivery identified in Exhibit A-1 at which points delivery shall be deemed to take place. In the event there is more than one receiving pipeline, Buyer shall include with its notice provided in Article IV, Section 1, the quantities of gas to be delivered to each pipeline. This notification of the proportion of the monthly nomination to be delivered into each receiving pipeline, where there is more than one, shall be subject to the concurrence of Seller, which concurrence shall not be unreasonably withheld. Said gas shall then be transported by the initial receiving pipeline and redelivered by it as provided in Exhibit A in keeping with the terms and provisions of the gas transportation contracts or any subsequent contracts entered into between those parties which may supersede the gas transportation contracts.

Notwithstanding anything to the contrary that may be contained or inferred herein, Seller shall be responsible for making suitable arrangements with the initial receiving pipeline for the first deliveries of the gas provided to be sold and purchased hereunder at the delivery point(s), including absorbing all expenses of transporting gas to the delivery point(s), and Buyer shall be responsible for making suitable arrangements with, and paying initial receiving pipeline(s) for the transportation of said gas after receipt at the delivery point(s) and the redelivery of the same to Buyer.

5. It is recognized that the parties will be unable to control exactly the quantities of gas delivered hereunder and received by the initial receiving pipeline for the account of Buyer on any day, and that the actual quantities received by the initial receiving pipeline for the account of Buyer may vary above or below the actual quantities nominated by Buyer. Such variations shall be considered imbalances and shall be kept to the minimum permitted by operating conditions and shall be balanced as soon as practicable but in no event shall exceed a daily variation of 10%, and a monthly variation of 4%. If, in any month under this contract, beginning with the first complete contract month, Seller fails for any reasons other than force majeure or inability of initial receiving pipeline to take gas Seller has available for sale, to sell to Buyer and deliver to initial receiving pipeline for Buyer's account within the tolerances set forth above, Buyer's full monthly nomination up to the maximum monthly delivery rate set forth by month in Exhibit C, then:

(a) Buyer may, in its discretion, terminate this contract by giving Seller written notice of such termination within thirty (30) days following the last day of the month in which such failure occurs, and

(b) In addition, Seller shall pay Buyer for the lesser of (i) the volume of gas purchased in such month from other sources or (ii) the difference between (A) nominated gas volumes not exceeding the Maximum Monthly Quantity identified on Exhibit C and (B) the quantity actually received during said month of the Contract

Year (such difference shall hereinafter be referred to as the "Deficiency Gas"). The price to be paid by Seller for the "Deficiency Gas" shall be the difference between (i) the actual burnertip cost paid by Buyer not to exceed the minimum price offered by the supplying local distribution company and (ii) the burnertip cost of gas provided to be sold and purchased hereunder.

6. If, in any month during the term hereof, the full quantities nominated by Buyer are not being delivered to Buyer for reasons of force majeure, or any other reason, Seller shall immediately give notice and full particulars of such interruption in writing or by telegraph to Buyer as soon as reasonably possible. Should such interruption occur for reasons other than force majeure and no gas is received for seven (7) consecutive days by the initial receiving pipeline(s) for Buyer's account and Buyer and the initial receiving pipeline(s) are ready and able to receive deliveries of gas for the account of Buyer, Buyer may terminate this Contract by giving twenty-four (24) hours written notice of such termination.

7. If for any reason the full amount of gas nominated by Buyer in accordance with the provisions hereof is not delivered to the initial receiving pipeline by Seller for Buyer's account during any month, within the tolerances specified in Section 5 of this Article IV, then Buyer shall have the right to purchase gas contemporaneously from any other sources to make up for any resulting inability to receive gas from Seller under this Contract, and any such make-up gas so purchased from other sources shall be deducted from the quantity of gas Buyer will purchase from Seller and pay for and cause to be taken as provided in Article III.

8. If, during any month of any Contract Year, Buyer has incurred any Deficiency Gas, the price to be paid by Seller for the Deficiency Gas shall be paid for by Seller within 15 days of the receipt by Seller of billing from Buyer with appropriate supporting data, said billing to be rendered within 30 days of the

end of the month during which Buyer incurred the Deficiency Gas.

9. Buyer will pay for such quantities of gas as are received by initial receiving pipeline for Buyer's account pursuant to this Contract provided that such quantities, within the tolerances specified in Section 5 of this Article V, do not exceed the quantities nominated.

10. If increases in the transportation charges paid by Buyer or other cost increases, or a reduction in the rate schedule of a local distribution company serving Buyer at Buyer's facilities listed on Exhibit B or any other event shall cause the burnertip cost of the gas provided to be sold and purchased hereunder to exceed the burnertip cost under the rate schedule at which Buyer could obtain quantities of equivalent gas from the local distribution company or obtain equivalent volumes of an alternate fuel supply which serves one or more of Buyer's facilities in Exhibit B, then Buyer may (a) give Seller thirty (30) days' written notice to meet the price in the local distribution company rate schedule or price of alternate fuel supplies. If Seller fails to meet that price, then Buyer shall have the right to terminate this Contract by giving Seller a fifteen (15) day written notice of such termination and thereafter neither party shall have any further obligation to the other except that Buyer shall pay any amounts then or thereafter due for gas taken hereunder or that Seller is required to deliver to the initial receiving pipeline after the termination date to make up for imbalances that occurred prior to the termination date; or (b) if the burnertip cost of the gas provided to be sold and purchased hereunder shall exceed the burnertip cost under the rate schedule at which Buyer could obtain quantities of equivalent gas from the local distribution company or obtain equivalent volumes of an alternate fuel supply which serves one or more of Buyer's facilities but not all facilities identified in Exhibit B, then Buyer may give Seller thirty (30) days written notice to meet the price in the local distribution company rate schedule or price of alternate fuel supplies for the quantities under this Contract reasonably attributable to those facilities so affected. If Seller fails to meet the price, then Buyer shall have the right to reduce

the Maximum Annual Quantity, Maximum Monthly Quantity, and Maximum Daily Quantity in Exhibit C by the volumes reasonably attributable to those facilities by giving Seller fifteen (15) days' written notice thereof, and then remove such facilities from Exhibit B.

ARTICLE V

PRICE

1. Subject to the other provisions of this Article V, the price to be paid by Buyer to Seller for gas sold by Seller to Buyer hereunder shall be that amount identified in Exhibit C, it being understood that the total amount due by Buyer to Seller for gas sold each month by Seller to Buyer hereunder shall be determined by multiplying the price provided to be paid for said gas hereunder by the total quantities of gas delivered by Seller to the initial receiving pipeline(s) for Buyer's account during such month in keeping with the provisions thereof.

2. In the event the maximum lawful price authorized by the NGPA, or by any other applicable federal or state statute or law, shall be reduced below the price identified in Exhibit C, such maximum lawful price shall be substituted for the price identified in Exhibit C for as long as said maximum lawful price remains lower than the price set forth in Exhibit C.

3. Seller shall give Buyer credit for increases, if any, in transportation charges incurred by Buyer due to Seller's use of alternate delivery points listed on Exhibit A-2. The amount to be credited by Seller for utilizing alternate delivery points shall be the actual difference in (i) the total monthly transportation charges incurred by Buyer and (ii) the total monthly transportation charges calculated by multiplying the monthly volume delivered by the weighted average of the transportation charges from the delivery point(s) listed on Exhibit A-1. The total amount for increased transportation charges shall be credited by Seller to Buyer on the Seller's following month's invoice.

ARTICLE VI

GAS QUALITY AND DELIVERY PRESSURE

1. The quantities of natural gas delivered and sold hereunder shall conform to the quality and pressure specifications at the point(s) of delivery in accordance with the applicable provisions of the transportation contract between Buyer and initial receiving pipeline identified in Exhibit A.

2. Seller shall deliver all gas provided to be sold and purchased hereunder to the initial receiving pipeline(s) for Buyer's account at a pressure sufficient to allow said gas to enter said pipeline(s) at the point or points of delivery thereof by Seller to said pipeline(s).

ARTICLE VII

MEASUREMENTS

1. The quantities of gas delivered and sold hereunder shall be measured and determined at the point(s) of delivery in accordance with the applicable provisions of the transportation contract between Buyer and initial receiving pipeline identified in Exhibit A.

2. Seller and Buyer agree and acknowledge that testing and measurement of gas delivered hereunder at the point(s) of delivery shall be conducted by the initial receiving pipeline(s). Seller and Buyer hereby agree to accept such testing and measurement as conclusive for all purposes under this Contract. Buyer, upon receipt of notice from the receiving pipelines of an upcoming test of the measurement equipment, shall notify Seller. Buyer or Seller or their respective representatives may elect to witness such test or tests. The accuracy of the measuring equipment of the initial receiving pipeline(s) shall be subject to verification by Buyer and Seller in keeping with the standard procedures therefor of the initial receiving pipeline(s).

ARTICLE VIII

BILLING AND PAYMENT

1. (a) Seller shall forward to Buyer, on or before the twelfth (12th) day of each month, a statement setting forth the volume of gas delivered to the initial receiving pipeline(s) for Buyer's account on behalf of Seller during the preceding month under this Contract, the Btu content, the price and the total amount payable by Buyer therefor. All gas shall be paid for on a Btu basis.

(b) If Seller does not receive information from the receiving pipeline in sufficient time, such that Seller is unable to inform Buyer, on or before the 12th day of each month, of actual volumes delivered to Buyer, Seller shall invoice Buyer based on Buyer's nomination for that month unless Seller delivered less gas from Buyer's nomination, in which event Seller shall invoice Buyer based on the best information then reasonably available. If payment is based on estimates of volumes or if Seller's detailed statement differs from that of the initial receiving pipeline(s), it shall be subject to correction and appropriate credit or additional payment in the following month based on actual volumes delivered for that month.

2. Buyer shall make payment to Seller, pursuant to the statement, on or before the twenty-fifth (25th) day of the month in which the statement is rendered for gas delivered during the preceding month, but Buyer shall not be obligated to pay for any quantities which exceed the quantities nominated by Buyer for that month by more than the tolerance specified in Section 5 of Article IV hereof.

3. Payment by Buyer to Seller shall be made on or before the due date. Such payment is to be sent by Buyer to Seller at the address identified in Exhibit D, or such other depository as Seller may designate from time to time in writing. When the due date falls on a weekend or holiday, Buyer shall cause such payment to be made on or before the first business day on which the designated depository is open after such due date.

4. Each party hereto shall have the right at reasonable hours to examine the books, records and charts of the other party to the extent necessary to verify the accuracy of any statement, charge or computation made pursuant to the provisions of this Contract. If any such examination reveals an inaccuracy resulting in an error in any billing theretofore made, the necessary adjustments in such billing and payments shall be promptly made. Each party shall preserve all records and charts or other similar records for a period of at least three (3) years, but neither party shall be required hereby to maintain same for any longer period.

5. If Buyer fails to make payment for the gas delivered hereunder when such payment is due, Seller may, in its discretion, in addition to any other remedies available to it by law, or pursuant to this contract, suspend or terminate deliveries of gas.

ARTICLE IX

TITLE AND LIABILITY

1. Title to all gas sold and purchased hereunder shall pass from Seller to Buyer at the point of delivery at which Seller delivers said gas to the initial receiving pipeline(s) for Buyer's account. Seller shall be deemed to be in control and possession of said gas until it shall have been delivered to the initial receiving pipeline(s) at the point(s) of delivery, after which the initial receiving pipeline(s) shall be deemed to be in control and possession of the gas hereunder until it shall have been transmitted and delivered by such pipeline(s) to another company as provided in the applicable gas transportation contract and Exhibit A. If the company to which the initial receiving pipeline delivers the gas is not Buyer, after delivery of the gas to the other company that other company shall be deemed to be in control and possession of the gas hereunder until it shall have been transmitted and delivered by such other company to another in keeping with the provisions of the applicable gas transportation contract and Exhibit A, and so on until said gas shall be delivered to Buyer's facilities identified in Exhibit B. Buyer shall have no responsibility with respect to any gas hereunder at any time

because of anything which may be done, happen, or arise with respect to said gas before it is transmitted and delivered to Buyer's facilities, other than to pay Seller for gas delivered to the initial receiving pipeline(s) pursuant hereto. It is the understanding and intent of the parties hereto that Seller will assume the full cost and expense, as well as full and complete liability and responsibility, for collecting, gathering, metering, and transporting the gas to the delivery point(s), including the full costs and expense of any compression and other facilities necessary to deliver the full volumes provided to be sold and purchased hereunder to the delivery point(s).

2. Seller will indemnify, defend and save Buyer harmless from any and all suits, actions, claims, damages, or other liabilities or costs arising out of the loss or damage to property or injury or death of any person or persons whomsoever, except for any liability for injury or death of any person or persons due to Buyer's sole negligence, occurring upstream of the delivery point(s) to the initial receiving pipeline(s) in the performance of this Contract.

3. Buyer will also indemnify, defend and save Seller harmless from any and all suits, actions, claims, damages, or costs arising out of the loss or damage to property or to any person or persons whomsoever, or arising out of the injury or death of any person or persons whomsoever, in the event that such loss, damage, injury or death shall be proximately caused by any act or omission, or any breach of any statutory duty of Buyer, or its employees or agents, occurring in the performance of this Contract.

ARTICLE X

TAXES

1. Seller shall bear the economic burden of all taxes and assessments that may be imposed with respect to the gas delivered hereunder prior to its delivery to the initial receiving pipeline(s) at the point(s) of receipt specified herein and imposed incident to the sale to Buyer or delivery of such gas to the initial receiving

pipeline for Buyer's account, and Buyer shall bear the economic burden of all taxes and assessments imposed upon Buyer with respect to the gas delivered hereunder after its receipt by the initial receiving pipeline for Buyer's account. Neither party shall be responsible for any taxes or other statutory charges levied or assessed against any of the equipment of the other party used for the purpose of carrying out the provisions of this Contract. As to taxes to be borne by Seller as above set out, but for which Buyer makes payment on Seller's behalf, Buyer may deduct such payment from amounts due Seller hereunder.

2. Buyer shall not be liable for any tax levied or assessed upon or with respect to oil, condensate, liquefiable hydrocarbons or other liquids, helium or nonhydrocarbon substances which may be extracted or separated by Seller prior to delivery of gas delivered hereunder, or upon or with respect to the process prior to delivery of extracting or separating any such products or substances from such gas or of handling, selling, transporting or otherwise dealing in or with any of such products or substances, all of which taxes shall be borne and paid solely by Seller and if paid by Buyer, may be deducted from amounts due Seller hereunder.

ARTICLE XI

WARRANTY

Seller hereby warrants title to all gas purchased hereunder and the right to sell the same, and Seller further warrants that all such gas is owned by Seller free from all liens and adverse claims, including liens to secure payment of production taxes, severance taxes, and other taxes levied on Seller or on the gas delivered hereunder. Seller at all times shall have the obligation to make settlements with all persons having any interest in the gas sold hereunder; and Seller agrees to indemnify and defend Buyer, and save it harmless from all suits, actions, debts, accounts, damages, costs, losses and expense arising out of or from adverse claims of any and all persons to said gas or to royalties, taxes, license fees, or charges thereon, or which may be levied and assessed upon the sale thereof to Buyer. In the event that a dispute develops

concerning the ownership of any gas delivered hereunder, Buyer shall have the right to withhold payment for said gas, without the payment of interest, until the dispute has been resolved, unless Seller furnishes to Buyer a bond or corporate undertaking sufficient to satisfy any adverse claims.

ARTICLE XII

NOTICES

1. Except as otherwise provided herein, any notice provided for in this Contract or any notice which Buyer or Seller may give to the other party shall be in writing. Any notice desired to be given under this Contract may be given as follows:

(i) by personally handling such notice to an officer of the receiving party or to some other responsible management employee of the receiving party; or

(ii) by prepaid registered mail to the address or addresses identified in Exhibit D.

(iii) by telex to the telex number identified in Exhibit D.

(iv) by telecopier to the telecopier number identified in Exhibit D. Such other addresses, telex number or telecopier number as a party may from time to time designated by written notice.

2. A notice delivered by hand shall be deemed to be received at the time it is delivered to an officer or to a responsible management employee of the receiving party. A notice sent by telex or telecopier shall be deemed to be received twenty-four (24) hours after such notice was sent. A notice sent by registered mail shall be deemed to be received five (5) business days after the date on which it was mailed but excluding herefrom each day during which there exists an interruption of postal service due to a strike, lockout or any other cause; provided in such event no notice may be sent by mail during the term of any such strike, lockout or such other cause constituting a mail disruption.

All routine communications between the parties, other than notices as aforesaid, may be sent by ordinary or registered mail.

ARTICLE XIII

FORCE MAJEURE

1. In the event of either party hereto being rendered unable, wholly or in part, by force majeure to carry out its obligations under this Contract, other than to make payments due hereunder, it is agreed that on such party giving notice and full particulars of such force majeure in writing or by telegraph to the other party as soon as reasonably possible after the occurrence of the cause relied on, then the obligations of the party giving such notice, so far as they are affected by such force majeure, shall be suspended during the continuance of any inability so caused. Such cause shall, as far as possible, be remedied with all reasonable dispatch.

2. The term "force majeure" as employed herein shall mean acts of God, strikes, lockouts or other industrial disturbances, sabotage, acts of the public enemy, wars, blockades, insurrections, riots, epidemics, landslides, crevasses, lightning, earthquakes, fires, storm warnings, hurricanes, tornadoes, floods, washouts, impassable snow conditions, road bans, shut-downs for emergency repairs or alterations, breakage or accidents to wells, machinery or pipelines, freezing of wells or lines of pipe, arrests and restraints of governments and people, civil disturbances, explosions, and any other like causes, whether of the kind herein enumerated or otherwise, not within the control of the party claiming suspension and which by the exercise of due diligence such party is unable to prevent or overcome.

3. It is understood and agreed that the settlement of strikes or lockouts shall be entirely within the discretion of the party having the difficulty and that the above requirement that any force majeure shall be remedied with all reasonable dispatch shall not require the settlement of strikes or lockouts by acceding to the demands of the opposing party when such course is inadvisable in the discretion of the party having the difficulty.

4. Neither party shall be entitled to the benefit of the foregoing provisions of this Article XIII hereof under any of the additional circumstances:

(a) to the extent that the failure was caused by the contributory negligence of the party claiming suspension;

(b) if the failure was caused by lack of funds or with respect to the payment of any amount or amounts due hereunder.

5. As soon as practicable after the force majeure event shall have been remedied, the party claiming suspension shall likewise give notice to the effect that the same has been remedied and that such party has resumed, or is then in a position to resume, the performance of such covenants or obligations.

ARTICLE XIV

PLANT CLOSING

If Buyer elects to temporarily and/or permanently close or sell any of its industrial facilities identified in Exhibit B for business reasons, then upon 30 days prior written notice to Seller by Buyer the Maximum Daily Quantity, Maximum Monthly Quantity, and the Maximum Annual Quantity may be reduced by the amount of the said facility's forecasted quantities, for the period the facility(ies) are closed or sold, as determined by the parties. Buyer or Seller shall have the option to terminate this Contract, upon thirty days notice, in the event that Buyer elects to permanently close all of its industrial facilities identified in Exhibit B for business reasons.

ARTICLE XV

CONTINGENCY

This Contract is made with the understanding that the pipelines identified in Exhibit A, or their successors or assigns, shall, during the term hereof, enter into gas transportation contracts to transport gas on terms satisfactory to Buyer to enable Buyer to continue to transport the gas provided to be sold and purchased hereunder. Should such transportation be discontinued, this

Contract shall thereafter be of no force and effect, except to require payment then or thereafter due for gas delivered or required to be delivered by Seller thereafter hereunder.

ARTICLE XVI

TERM

Unless sooner terminated in keeping with the provisions hereof, this Contract shall commence with the date written above and shall remain in force and effect for a period of one year and month to month thereafter, provided that subject to provision of Article IV, this Contract may be terminated by either party at the end of the first year or any subsequent month hereunder if either party gives written notice of such termination at least thirty (30) days prior to the expiration of such first year or any subsequent month thereafter.

ARTICLE XVII

SUCCESSORS AND ASSIGNS

Either party may assign its interest hereunder, with consent of the other party, in writing, to an affiliate or any company which shall succeed by purchase, merger, consolidation, or other transfer of substantially all of its assets involved in this Contract. In the event of any such assignment, such successor shall be entitled to the rights and shall be subject to the obligations of its predecessor under this Contract. Otherwise, neither party shall assign this Contract without the prior written consent of the other party, which consent shall not be unreasonably withheld. In either event, the party assigning its interest shall not be released from any of its obligations by the other party unless such assignment expressly provides that assignee assumes all duties and obligations of the assigning party. Nothing herein contained shall prevent or restrict either party from pledging, granting a security interest in, or assigning as collateral all or any portion of such party's interest in this Contract to secure any debt or obligation of such party under any mortgage, deed of trust, security agreement or similar instrument.

ARTICLE XVIII

MISCELLANEOUS

1. The failure of either party hereto at any time to require performance by the other party of any provision hereof shall in no way affect the right of such party thereafter to enforce the same, nor shall the waiver by either party hereto of any breach of any provision hereof by the other party be taken or held to be a waiver by such party of any succeeding breach of such provision, or as a waiver of the provision itself.

2. In the event either Buyer or Seller shall fail to perform any of its obligations hereunder in accordance with the terms and conditions of this Contract, and if the defaulting party does not commence to remedy such failure within thirty (30) days after written notice thereof has been given by the nondefaulting party to the defaulting party, or thereafter fails to proceed diligently to remedy such failure, then this Contract and all of the provisions hereof may be terminated forthwith by the nondefaulting party by written notice to the defaulting party; provided, however, that any termination by the nondefaulting party shall be in addition to and not in lieu of any other remedy available to the nondefaulting party hereunder or any other legal or equitable remedy which may be available to the nondefaulting party and shall be without prejudice to the Seller's right to collect any amounts due from Buyer prior to the time of termination. Anything to the contrary in this Contract notwithstanding, neither Buyer or Seller shall be liable to the other for loss of profits or for any other incidental or consequential damages whatsoever.

3. If, at any time during the term of this Contract, (i) Seller's obligations under this Contract shall become subject to regulation by a state public utilities commission, the Federal Energy Regulatory Commission, Department of Energy or other governmental regulatory entity or (ii) Buyer shall be notified that proceedings will be or have been initiated to declare it a public utility or subject it to regulation by any governmental regulatory entity, then and in either of such events, the adversely affected party may elect to terminate this Contract by giving twenty-four

(24) hours' notice of such termination to the other. Such notice shall be confirmed in writing within five days of the day it is given.

4. In the event the above-mentioned gas transportation contracts are superseded by other subsequent transportation contracts, Buyer shall deliver a true copy of such subsequent transportation contract(s) to Seller who shall acknowledge receipt therefor in writing. It is agreed between the parties that the terms and provisions of said gas transportation contract or subsequent transportation contracts, as the case may be, shall to the same extent as the prior transportation contracts are applicable to the sale by Seller and purchase by Buyer of the gas herein referred to in keeping with the provisions hereof, be incorporated herein and made a part hereof by reference in the same manner as if said terms and provisions were recited herein at length.

5. The headings of various Articles of this Contract are for conveniences only and are not to be considered as interpreting any provision of this Contract.

6. This Contract sets forth all understanding between the parties respecting the subject matter hereof, and all prior contracts, understandings, and representations, whether oral or written, representing such subject matter are merged into and superseded hereby. No modification or amendment of this Contract shall be binding on either party unless in writing and signed by the party to be bound.

7. The parties hereto shall from time to time, and at all times, do all such further acts and execute and deliver all such further deeds and documents as shall be reasonably required in order to fully perform and carry out the terms of this Contract.

8. Any waivers by either party shall only be effective if in writing. No waiver by Buyer or Seller of any default by the other under this Contract shall operate as a waiver of a future default whether of a like or different character.

9. Each party's books, accounts and records respecting the sale and purchase of Gas under this Contract may be audited

within twenty-four (24) months next following the end of a Contract Year for which such sale, purchase or payment was made. Each party may conduct such audit upon reasonable notice to the other party, and the cost of such audit shall be at the auditing party's own expense. Any claim arising out of such audit must be presented by the auditing party within two (2) months of the completion of the audit. Any overage or underage shall be paid by the appropriate party within thirty (30) days after determination thereof.

10. In the event that any one or more terms or provisions of this Contract are found to be void or unenforceable for any reason, such terms and provisions shall be considered at such time to be deleted from this Contract, and this Contract shall continue in full force and effect as if such terms and provisions were never part of this Contract.

11. Whenever the singular or masculine or neuter is used in this Contract, the same shall be construed as meaning plural or feminine or body politic or corporate, and vice versa where the context or the parties hereto so require.

ARTICLE XIX

LAWS, ORDERS, RULES AND REGULATIONS

1. This Contract, and the rights and obligations of the parties, and the performance by either party of any and all of the obligations set forth in this Contract shall be subject to all valid and applicable laws, orders, rules and regulations of any duly constituted authority having jurisdiction.

2. This Contract shall be interpreted in accordance with the laws, customs and usage of the State of Indiana.

IN WITNESS WHEREOF, the parties hereto have caused this Contract to be executed as of the day and year first above written.

SELLER: MOBIL NATURAL GAS, INC.

WITNESS:

/s/ Sandra L. [illegible] By: /s/ D.R. Briggs

Its: Attorney-in-Fact

BUYER: GENERAL MOTORS CORPORATION

WITNESS:

/s/ R.J. Woebman By: /s/ R.H. [illegible]

Its: Vice President

EXHIBIT A

To Gas Purchase Agreement

GM Inquiry # 19-88

Transporting Pipelines

1. Initial Receiving Pipeline: Texas Gas Transmission Corp. (TGT)

   - Delivery by Seller to interconnect(s) identified on Exhibit A-1.

2. Delivery by No. 1 to:

   1. Indiana Gas Company (Indiana)
   2. Citizens Gas & Coke Utility (Citizens)
   3. Western Kentucky Gas Company (Western)
   4. Consolidated Gas Transmission Corp. (Consolidated)

   - Delivery by No. 1 to interconnect at:

     1. TGT and LDC's listed above
     2. TOT and Consolidated at LeBanon, Ohio

3. Delivery by No. 2 to:

   Items 1-3 to GM plants listed on Exhibit B

   Item 4 (Consolidated) to:

   1. Rochester Gas & Electric Company (Rochester)
   2. East Ohio Gas Company (East Ohio)

   - Delivery by No. 2 to interconnect at:

     LDC's listed above and GM plants

     Consolidated to:

     1. Rochester
     2. East Ohio

4. Delivery by No. 3 to Buyer's facilities identified on Exhibit B.

* *

A. Second Initial Receiving Pipleline: _____

- Delivery by Seller to interconnect(s) identified on Exhibit A-2.

B. Delivery by A to: _____

- Delivery by A to interconnect at:

_____

C. Delivery to B to:_____

- Delivery by B to interconnect at:

_____

D. Delivery by C to Buyer's facilities identified on Exhibit B.

EXHIBIT A-1

To Gas Purchase Contract

GM Inquiry # 19-88

Delivery Points Into Initial Receiving Pipeline

Number Name (Well, Processing Plant, platform etc.)	Location (Section, Twp. Range, County, State)
Interconect between Texas Gas Transmission and Consolidated Gas Transmission	LeBanon, Ohio

MOBIL NATURAL GAS INC.
~~MOBIL OIL CORPORATION~~
TEXAS GAS RECEIPT POINTS

I. DIRECT PRODUCTION:

NAME: Superior - Souh Thornwell
DESCRIPTION:
SECTION NO. 5 TOWNSHIP NO: 12 South RANGE NO.: 4 West
COUNTY/PARISH: Cameron Parish STATE: Lousisiana
TGT ZONE: 1 ONSHORE/OFFSHORE: Onshore BLOCK NO.:
PIPELINE: METER NO.: ~~693~~ 2822

EXHIBIT A-1 (Cont'd)
To Gas Purchase Contract

NAME:	Superior Pure	
DESCRIPTION:		
SECTION NO.	34 TOWNSHIP NO: 8 South	RANGE NO.: 3 East
COUNTY/PARISH:	Arcadia Parish	STATE: Texas
TGT ZONE:	SL ONSHORE/OFFSHORE: Onshore	BLOCK NO.:
PIPELINE:		METER NO: 2740
NAME:	High Island 302 "A"	
DESCRIPTION:	High Island Area	
SECTION NO.	TOWNSHIP NO:	RANGE NO.:
COUNTY/PARISH:		STATE: Texas
TGT ZONE:	SL ONSHORE/OFFSHORE: Offshore	BLOCK NO.: 302 "A"
PIPELINE:		METER NO: 2858
NAME:	High Island A-334 "A"	
DESCRIPTION:	High Island Area	
SECTION NO.	TOWNSHIP NO:	RANGE NO.
COUNTY/PARISH:		STATE: Texas
TGT ZONE:	SL ONSHORE/OFFSHORE: Offshore	BLOCK NO.: A-334 "A"
PIPELINE:		METER NO: 2863

EXHIBIT A-1 (Cont'd)
To Gas Purchase Contract

NAME:	Block A-572 "C"	
DESCRIPTION:	On Central Platform "C" Block A-572, High Island Area	
SECTION NO.	TOWNSHIP NO:	RANGE NO.
COUNTY/PARISH:		STATE: Texas
TGT ZONE:	SL ONSHORE/OFFSHORE: Offshore	BLOCK NO.: A-572
PIPELINE:		METER NO:

EXHIBIT A-2

To Gas Purchase Contract

GM Inquiry # 19-88

Delivery Points Into Initial Receiving Pipeline

Number Name (Well, Processing Plant, platform etc.) Location (Section, Twp. Range, County, State)

NAME:	High Island A-573 "A"	
DESCRIPTION:	High Island Area	
SECTION NO.	TOWNSHIP NO:	RANGE NO.
COUNTY/PARISH:		STATE: Texas
TGT ZONE:	SL ONSHORE/OFFSHORE: Offshore	BLOCK NO.: A-573
PIPELINE:		METER NO: 2859
NAME:	High Island A-573 "B"	
DESCRIPTION:	Inlet Side of Existing Measurement Facilities on Central Production Paltform "B", High Island Area Block A-573	
SECTION NO.	TOWNSHIP NO:	RANGE NO.
COUNTY/PARISH:		STATE: Texas
TGT ZONE:	SL ONSHORE/OFFSHORE: Offshore	BLOCK NO.: A-573
PIPELINE:		METER NO:

EXHIBIT A-2 (Cont'd)
To Gas Purchase Contract

NAME:	High Island A-595 "CF"	
DESCRIPTION:	High Island Area	
SECTION NO.	TOWNSHIP NO:	RANGE NO.
COUNTY/PARISH:		STATE: Texas
TGT ZONE:	SL ONSHORE/OFFSHORE: Offshore	BLOCK NO.: A-595
PIPELINE:		METER NO: 2542

NAME:	EGAN	
DESCRIPTION:	Interconnection with Columbia Gulf Transmission Company	
SECTION NO.	5 TOWNSHIP NO: 10 South	RANGE NO. 1 West
COUNTY/PARISH:	Acadian Parish	STATE: Lousisiana
TGT ZONE:	SL ONSHORE/OFFSHORE: Onshore	BLOCK NO.:
PIPELINE:	Columbia Gulf Transmission Company	METER NO: 9003

NAME:	EUNICE	
DESCRIPTION:	Near ANR Compressor Station	
SECTION NO.	1 TOWNSHIP NO: 7 South	RANGE NO. 2 West
COUNTY/PARISH:	Acadia Parish	STATE: Louisiana
TGT ZONE:	SL ONSHORE/OFFSHORE: Onshore	BLOCK NO.:
PIPELINE:	ANR	METER NO: 935

EXHIBIT A-2 (Cont'd)
To Gas Purchase Contract

NAME:	EVANGELINE	
DESCRIPTION:	Interconnection with Texas Eastern Transmission Corporation	
SECTION NO.	18 TOWNSHIP NO: 6 South	RANGE NO. 1 West
COUNTY/PARISH:	Evangeline Parish	STATE: Louisiana
TGT ZONE:	SL ONSHORE/OFFSHORE: Onshore	BLOCK NO.:
PIPELINE:	Texas Eastern Transmission Corporation	METER NO: 8112

EXHIBIT A-2

To Gas Purchase Contract

GM Inquiry # 19-88

Delivery Points Into Initial Receiving Pipeline

Number Name (Well, Processing Plant, platform etc.) Location (Section, Twp. Range, County, State)

NAME:	LOWRY	
DESCRIPTION:	Interconnection with Natural Gas Pipeline Co. of America	
SECTION NO.	8 TOWNSHIP NO: 12 South	RANGE NO. 4 West
COUNTY/PARISH:	Cameron Parish	STATE: Louisiana
TGT ZONE:	SL ONSHORE/OFFSHORE: Offshore	BLOCK NO.:
PIPELINE:	Natural Gas Pipeline Co. of America	METER NO: 9446
NAME:	MAMOU	
DESCRIPTION:	Interconnection with Transcontinental	
SECTION NO.	6 TOWNSHIP NO: 6 South	RANGE NO. 1 West
COUNTY/PARISH:	Evangeline Parish	STATE: Louisiana
TGT ZONE:	SL ONSHORE/OFFSHORE: Offshore	BLOCK NO.:
PIPELINE:	Transcontinental Gas Pipeline Corp.	METER NO: 8147

EXHIBIT A-2 (Cont'd)
To Gas Purchase Contract

NAME:	RITCHIE	
DESCRIPTION:	Interconnection with Transcontinental Pipeline Corp.	
SECTION NO.	14 TOWNSHIP NO: 7 South	RANGE NO. 1 West
COUNTY/PARISH:	Acadia Parish	STATE: Louisana
TGT ZONE:	SL ONSHORE/OFFSHORE: Offshore	BLOCK NO.:
PIPELINE:	Transcontinental Gas Pipeline Corp.	METER NO: 8145
NAME:	TEXACO-HENRY	
DESCRIPTION:	Tailgate of Texaco-Henry Processing Plant	
SECTION NO.	21 TOWNSHIP NO: 13 South	RANGE NO. 4 East
COUNTY/PARISH:	Vermillion Parish	STATE: Louisiana
TGT ZONE:	SL ONSHORE/OFFSHORE: Offshore	BLOCK NO.:
PIPELINE:		METER NO: 2790

EXHIBIT A-2

To Gas Purchase Contract

GM Inquiry # 19-88

Delivery Points Into Second Initial Receiving Pipeline

Number	Name (Well, Processing Plant, platform etc.)	Location (Section, Twp. Range, County, State)

EXHIBIT B

To Gas Purchase Contract

GM Inquiry # 19-88

Buyer's Facilities

(name and street address)

1. Central Foundry Bedford (Indiana Gas)
   North Jackson Street
   Bedford, IN 47421

2. CPC Bowling Green (Western KY)
   165 & 31 W. Spur
   Bowling Green, Kentucky 42101

3. General Motors Truck & Bus Group (Indiana Gas)
   340 White river Parkway
   Indianapolis, IN 46206

4. Detroit Diesel Allison (Indiana Gas)
   Plant #3, 800 Grande Avenue
   Indianapolis, IN 46206

5. Detroit Diesel Allison (Indiana Gas)
   700 Grande Avenue
   Indianapolis, IN 46206

6. Allison Gas Turbine Operations (Indiana Gas)
   2235 South Tibbs Avenue
   Indianapolis, IN 46206

7. General Motors Corporation, Delco Products Divn. (RG&E)
   1555 Lyell Avenue
   Rochester, NY 14601

8. Rochester Products (RG&E)
   1000 Lexington Avenue
   Rochester, NY 14603

EXHIBIT B (Cont'd)
To Gas Purchase Contract

9. Packard Electric (EOG)
North River Road Plt. #9 - 14
North River Road, N.E.
Warren, OH 44483

10. Parkard Electric (EOG)
Warren Plts #1 - 5
408 Dana Street
Warren, OH 44483

GM PLANTS SERVED BY EOG

11. Parkard Electric (EOG)
Austintown Plt. #44
500 Victoria Road
Youngstown, OH 44515

12. Parkard Electric (EOG)
Austintown Plt. #43
427 Thacher Lane
Youngstown, OH 44515

13. Parkard Electric (EOG)
Hubbard Plt. #42
400 Myron Street
Hyubbard, OH 44425

14. Parkard Electric (EOG)
Rootstown Plt. #7
5245 South Prospect Street
Rootstown, OH 44272

15. Parkard Electric (EOG)
Cortland Plt. #46
1000 Fowler Street
Cortland, OH 44410

EXHIBIT B (Cont'd)
To Gas Purchase Contract

16. Parkard Electric (EOG)
Cortland Plt. #45
500 West Main Street
Cortland, OH 44410

17. Parkard Electric (EOG)
Warren Plt. #8
Griswold Street, N.E.
Warren, OH 44483

18. Parkard Electric (EOG)
Warren Plt. #41
1554 Thomas Road
Warren, OH 44484

19. Parkard Electric (EOG)
(CAC) Ridge Road Plt. #47
1330 Ridge Road
Vienna, OH 44473

20. Inland Division
Euclid Plant
2001 Euclid Avenue
Euclid, OH 44117

EXHIBIT C

To Gas Purchase Contract

GM Inquiry # 19-88

Quantity and Price

1. Maximum annual quantity under Article III: 2,760,639 MMBtu.

2. Maximum daily delivery rate under Article III: 9,200 MMBTu.

3. Maximum monthly delivery rate under Article IV:

Month	MMBtu
January	284,050
February	256,939
March	231,668
April	194,350
May	209,070
June	204,700
July	199,870
August	202,055
September	195,132
October	241,155
November	256,450
December	285,200

4. Price under Article V:

Initial receiving pipeline $1.65 sat per MMBtu frim price for 1 year.

EXHIBIT C (Cont'd)
To Gas Purchase Contract

Second inital receiving pipeline $_____ per MMBtu firm price for 1 year.

5. Term and year start at 8:00 a.m. June 1, 1988 through 7:59 a.m. May 31, 1989

EXHIBIT D

To Gas Purchase Contract

GM Inquiry # 19-88

Notices

Buyer: Payment Invoices and All Other Communications
General Motors Corporation
Energy Supply Division
1829 Hallock-Young Road
Warren, OH 44481
Attn: Operations Manager

Seller: Payment Invocies
Mobil Natural Gas, Inc.
11 Greenway Plaza
Suite 2500
Houston, TX 77016
Attn: Manager Gas Sales

All Other Communications:
Mobil Natural Gas, Inc.
11 Greenway Plaza
Suite 2500
Houston, TX 77016

[Filed Oct. 29, 1991]

STATE OF OHIO
DEPARTMENT OF TAXATION

In the matter of Sales and Use Tax
Assessment, Serial No. 91002252 S

JOURNAL ENTRY

General Motors Corporation
Central Foundry Division
East Second Street
Defiance, Ohio 43512

Direct Pay Permit No. 98-001900

(Found in the Appendix to the Petition for Certiorari at 20a-25a.)

[Filed Nov. 19, 1991]

BOARD OF TAX APPEALS
STATE OF OHIO

General Motors Corporation, General Motors Building 3044 West Grand Boulevard - TX-40 Detroit, MI 48202 Appellant,	)	
v.	)	Case No. 91-K-1558
Roger W. Tracy, Tax Commissioner of Ohio State Office Tower 30 East Broad Street - 22nd Fl. Columbus, OH 43266-003- Appellee.	)	(Ohio Use Tax) NOTICE OF APPEAL

(Found in Appendix to Respondent's Brief in Opposition at 6a-11a)

BOARD OF TAX APPEALS

STATE OF OHIO

General Motors Corporation,

Appellant,

vs. Case No. 91-K-1558
Sales and Use Tax

Roger W. Tracy, Tax
Commissioner of Ohio,

Appellee.

General Motors Corporation,
Packard Electric Division,

Appellant,

vs. Case No. 91-K-146

Roger W. Tracy, Tax
Commissioner of Ohio,

Appellee.

General Motors Corporation,

Appellant,

vs. Case No. 91-K-510

Roger W. Tracy, Tax
Commissioner of Ohio,

Appellee.

Wednesday, May 12, 1993

VOLUME I

[I-2] Hearing Room A
24th Floor
State Office Tower
30 East Broad Street
Columbus, Ohio 43266
Wednesday, May 12, 1993

Met, pursuant to assignment, at 1:30 o'clock p.m.

BEFORE: Bradford Arnold, Attorney-Examiner.

[I-3] APPEARANCES:

ON BEHALF OF THE APPELLANT:

John C. Duffy, Jr., Esq.
Jones, Day, Reavis and Pogue
North Point
901 Lakeside Avenue
Cleveland, Ohio 44114

ON BEHALF OF THE APPELLEE:

Lee Fisher, Esq.
Attorney General of Ohio

By: Barton Hubbard, Esq.
Assistant Attorney General
Taxation Section
State Office Tower
30 East Broad Street
6th Floor
Columbus, Ohio 43266-0410

ALSO PRESENT:

Fred DiIorio

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* * * *

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[I-9] Wednesday Afternoon Session

May 12, 1993

PROCEEDINGS

THE EXAMINER: We can go on the record.

This is a hearing before the Board of Tax Appeals, State of Ohio, relative to three appeals styled General Motors Corporation, Appellant, versus Roger W. Tracy, Tax Commissioner of Ohio, Appellee, having been assigned Board of Tax Appeals case nos. 91-K-1558, 92-K-146 and 92-K-510.

These appeals have been previously consolidated for purposes of discovery hearing.

These appeals are being heard in Hearing Room A in the offices of the Board of Tax Appeals on the 24th floor of the State Office Tower, 30 East Broad Street, Columbus, Ohio, on May 12th, 1993, at approximately 2:00 o'clock p.m., pursuant to assignment before Bradford P. Arnold, Attorney-Examiner for the Board of Tax Appeals.

Notices of appeal were filed with the Board of Tax Appeals on November 29th, 1991; January 30th, 1992, and May 19th, 1992 respectively, and were [I-10] appeals from final orders of the Tax Commissioner dated October 29th, 1991; December 30th, 1991, and March 31st, 1992 respectively.

These final orders in case nos. 91-K-1558, 92-K-146, the Tax Commissioner denied Appellant's objection to the assessment, but conditionally remitted the penalty which was imposed. With respect to case no. 92-K-510, Tax Commissioner modified the original assessment as imposed and unconditionally remitted the penalty.

Will the Appellant's representative please enter an appearance by name, mailing address and telephone number.

MR. DUFFY: John C. Duffy, Jr., Jones, Day, Reavis and Pogue, 901 Lakeside Avenue, Cleveland, Ohio 44114. Area code 216-586-7145.

THE EXAMINER: Thank you, Mr. Duffy. Will the Appellee's representative enter an appearance by name, mailing address and telephone number.

MR. HUBBARD: Good afternoon, your Honor.

Lee Fisher, Ohio Attorney General, by Barton A. Hubbard, Assistant Attorney General, for Roger W. Tracy, Tax Commissioner of Ohio. Our mailing [I-11] address is 30 East Broad Street, 16th floor, State Office Tower, Taxation Section, Columbus, Ohio 43266-0410. My telephone number is 614-466-5967.

THE EXAMINER: Thank you, Mr. Hubbard.

* * * *

[I-17] * * * *

At this time, Mr. Duffy, you may call your first witness.

* * * *

MR. DUFFY: At this time I would like to call the person who is here to respond on behalf of the subpoena that was issued to the Tax Commissioner of Ohio that was served by G.M. in these [I-18] consolidated cases. I believe that person is Mr. David W. Boeder.

(Witness sworn.)

THE EXAMINER: Mr. Duffy, you may proceed.

MR. DUFFY: Mr. Arnold, since Mr. Boeder is here as the designated representative of the Commissioner who is a party to this appeal, I request permission that you allow my testimony to take the form of cross-examination and that I be permitted to ask

him what might be otherwise characterized as leading questions if I were taking this on direct examination.

THE EXAMINER: Your request is granted. You may proceed as if on cross.

[I-19] David W. Boeder

being first duly sworn, as prescribed by law, was examined and testified as follows:

CROSS-EXAMINATION

BY MR. DUFFY:

Q. Mr. Boeder, would you please state your full name, and would you spell your last name.

A. David Wilson Boeder, B-o-e-d-e r.

Q. Mr. Boeder, are you currently employed, and if so by whom?

A. Yes, by the Ohio Department of Taxation.

Q. And what is your current business address?

A. It's 30 East Broad Street, Columbus, Ohio.

Q. And what is your current position with the Ohio Department of Taxation?

A. I am an Assistant Administrator in the Sales and Use Tax Division.

Q. How long have you held that position?

A. Approximately three years.

Q. What are your current duties and responsibilities as Assistant Administrator of the Sales and Use Tax Division?

A. I am responsible for audit activities for the Sales and Use Tax Division throughout the state. And I also have a group of

auditors called central audit [I-20] staff which are under my supervision.

Q. Has that been the scope of your duties and your responsibilities for the approximately three-year period that you have held that position?

A. Yes.

Q. In other words, the duties and responsibilities have not varied in any material way?

A. That is correct.

Q. Beginning with your initial employment, the date of your initial employment, would you state what other positions you have held with the department; the approximate time period that you held each such position, and the duties and responsibilities associated with each position.

A. I started with the department April 5th, 1971 in the central audit staff. I was an auditor primarily auditing for consumption in large manufacturing companies and public utilities for approximately six years.

After that I was a group supervisor in the central audit staff group, but I audited primarily companies who engaged in selling at the retail level, all of whom provided services.

And in 1981, I became a supervisor of the Audit Review Section of the Sales Tax Division and held that [I-21] post for about three and a half years, until January of 1985, at which time I became supervisor in central audit staff.

I was there approximately — I still have that job, as a matter of fact. And I became Assistant Administrator about three years ago.

Q. You're here today as the designee of the Tax Commissioner of Ohio in response to a subpoena that G.M. had the Board issue and was served on the Commissioner; is that correct?

A. That's correct.

Q. Have you seen a copy of the subpoena that was actually served on the Commissioner?

A. I have seen one, yes.

Thereupon, Appellant's Exhibit No. 1 was marked for purposes of identification.

MR. DUFFY: May we go off the record for a moment, please.

THE EXAMINER: Certainly.

(Discussion off the record.)

THE EXAMINER: Back on the record.

I will note for purposes of the record that while we were off the record, Mr. Duffy had [I-22] expressed a concern that the exhibits and transcript of this hearing today, and which will reconvene on Friday at 9:00 o'clock, be considered as exhibits in the transcript for purposes of all three case nos. 91-K-1558, 92-146 and 92-K-510.

On behalf of the Board, I will indicate that any exhibits which are marked for purposes of this hearing will be considered as exhibits in each of those cases, as will the transcript of the hearing in all three cases which is being convened today and will reconvene on Friday.

BY MR. DUFFY:

Q. Mr. Boeder, I'm going to hand you Appellant's Exhibit No. 1 and ask you if this is a copy of the subpoena that was served on the Commissioner that you stated that you previously reviewed and that you're here today in response to.

A. Yes, I think it is.

Q. Okay. Do you know whether or not the Commissioner has designated anyone other than yourself to respond to that subpoena?

A. To my knowledge, no. I am the only one.

Q. Are you aware that case no. 91-1558 involves an Ohio use tax assessment that was issued to General Motors Corporation following a consumer use tax audit [I-23] at its facility at Lordstown, Ohio for the periods of January 1, 1987 through December 31, 1989?

A. I am aware that there was an assessment. I did not look up the numbers, but yes.

Q. You are aware then at least one of the assessments involves the Lordstown facility?

A. Yes.

Q. But you don't know which one?

A. Right.

Q. If I were to ask you whether you were aware that case no. 92-146 involves an Ohio sales and use tax assessment that was issued to General Motors Corporation following a consumer use tax audit at its Packard Electric Division facility in Warren, Ohio for the period January 1, 1987 through June 30th, 1990, what is your response to that?

A. Yes, I am aware.

Q. Your are aware of that.

Are you aware that case no. 92-510 involves an Ohio sales and use tax assessment that is issued to General Motors Corporation following a consumer use tax audit at its Central Foundry Division facility in Defiance, Ohio for the period October 1, 1986 through June 30, 1990?

A. In the same sense of the first one; that is I [I-24] know an assessment was made. These were direct-pay assessments.

Q. Let me ask you this. What has been your specific involvement to date in each of these three assessments?

A. All three of the assessments are were issued by central audit staff group, and I was the supervisor of central audit staff. Based on the location you indicated, there would probably have been two or three different groups involved in this, but they were all under my general supervision.

Q. What is the central audit staff?

A. It's a unit of the sales tax division which audits larger taxpayers in the State of Ohio in terms of purchases, and it also audits larger retailers throughout the country.

Q. I take it then that the agents, after conducting an audit, prepare some type of summary for recommending a sales or use tax assessment, and it is your staff that would review that recommendation?

A. Yes.

Q. And the recommendation, if approved, would result in the issuance of these sales and/or use tax assessments?

A. That's correct.

Q. Have you had any other involvement to date in [I-25] each of these matters other than your involvement as supervisor of the central audit staff?

A. Not until the subpoena, in terms of some of the things that were discussed earlier and the remand and the terms of representing the Tax Commissioner here.

MR. HUBBARD: May we go off the record?

THE EXAMINER: Certainly.

(Discussion off the record.)

THE EXAMINER: Back on the record.

BY MR. DUFFY:

Q. Mr. Boeder, the subpoena that you just referred to in your last response, was this the subpoena for a hearing or was it a subpoena for a different proceeding related to these cases?

A. The one you just handed me, in terms of the proceeding.

Q. You did appear at a deposition on April 8th, 1993 in these cases, didn't you, as the designee of the Tax Commissioner?

A. I did.

Q. So you had some involvement in terms of that proceeding as well?

A. Yes.

Q. Have you had any other involvement to date in [I-26] these assessments other than what you have just provided in your responses?

A. Not to my knowledge, no.

Q. Are you aware that in each of these cases the Commissioner assessed Ohio use tax on purchases of natural gas made by G.M. outside Ohio, which natural gas was subsequently used or consumed at the three facilities that I have mentioned to you previously?

A. Yes.

Q. Do you know whether all of the natural gas purchased by G.M. outside of Ohio and used or consumed at these facilities during the audit period was subject to the Ohio use tax?

A. No, it was not.

Q. What portion was not, or what was the criteria for not assessing the use tax on all of it?

A. Whether or not the natural gas was used either — whether or not it was used directly in manufacturing. If it was not, it was assessed.

Q. So there was some natural gas that was purchased outside of Ohio and used or consumed by General Motors at its Ohio facilities directly in manufacturing, processing or processing of tangible personal property for sale, and it was exempted from taxation?

A. Yes.

[I-27] Q. Go ahead.

A. Probably the majority.

Q. What sections of The Revised Code would that gas have been exempted from taxation under?

A. Under 5739.02(E)(2).

MR. HUBBARD: Can we go off the record just briefly.

THE EXAMINER: Certainly.

(Discussion off the record.)

THE EXAMINER: Back on the record.

BY MR. DUFFY:

Q. Just as a point of clarification, Mr. Boeder, because a use tax was assessed here, there is an exemption in R.C. 5747.02(C)(2) that says that if the sale is made, if the purchases is made in Ohio, it would not be subject to the sales tax, they would not be subject to the use tax; isn't that correct?

A. I believe it's 5741. Are you talking about 5747?

Q. Did I say 47? I meant to say 5747.02(C)(2).

A. That is in the statute, yes.

Q. So that is the controlling use tax exemption then. You go to 5739.01(E)(2) to find the controlling sales tax exemption; is that correct?

A. Yes.

Q. For finding that the gas used directly in [I-28] manufacturing was not subject to tax?

A. Yes.

Q. I'm going to hand you the Statutory Transcript in case no. 92-510, and I am going to refer you to page 220 of the transcript. First of all, is page 220 a copy of one of the pages from the "Examiner remarks" prepared by the tax agent who conducted this audit?

A. Yes.

Q. And is it the policy of the department to have the tax agent prepare written remarks during the course of each audit?

A. It's required, yes.

Q. And so the examiner remarks that we find here in the Statutory Transcript beginning at page 211 are something that is required of every agent; is that right?

A. Yes, they are.

Q. Referring back to page 220 of the Statutory Transcript under the paragraph entitled "Natural gas," do you see that?

A. Yes.

Q. The tax agent indicates in his remarks that G.M. had purchased natural gas from a "broker," and that in the case of the Central Foundry Division facility that [I-29] was the subject of the audit in this particular case, that these purchases began back in November of 1988.

The agent goes on to state that he explained "this state's position" on these purchases to Mr. Moon. If you go back to page 2 of his remarks, which is found at page 212 of the Statutory Transcript, he indicates that Mr. Moon is a G.M. representative. Do you see that?

A. Yes.

Q. By the way, if I use the term "G.M." with you at any time today during this hearing, I am referring to The General Motors Corporation. Is that clear?

A. Yes.

Q. Referring you back then to page 220, after I made this introductory statement to you, what is the "state's position" regarding the natural gas purchased by G.M. that was assessed in that audit?

A. If the seller of natural gas does not own or control the facilities by which it is transported, the natural gas — that the gas is not sold by a natural gas company.

Q. How is that position communicated to tax agents?

A. It would be through the group supervisors from administration.

Q. Is there anything in writing that sets forth this [I-30] policy that the department has?

A. To my knowledge, there is nothing in writing to set forth the policy that was given to any agents.

Q. Is there anything in writing issued by the Department of Taxation to consumers or other persons who might buy natural gas that reflects this policy?

A. I am not aware of any.

Q. You talked about the position entailing ownership or control of the facilities over which the natural gas is transported by the seller. In other words, the ownership or control has to be the seller's. What do you mean by "ownership"?

A. Having the transportation facilities, the pipeline and compressor stations.

Q. How do you distinguish between control and ownership? What is the difference? Your answer was in the — I'm sorry,

your answer was in the disjunctive. What is the different between ownership and control?

A. I don't know. I don't know if you can lease it or lease pipelines or not own something and still be entitled to use it.

Q. Mr. Boeder, I'm going to hand you a journal entry that was issued by the Tax Commissioner in assessment no. 92004768U that is the subject of the appeal in case no. 91-1558. I'm not going to mark it as an exhibit [I-31] because a copy of that journal entry does appear in the Statutory Transcript at pages 1 and 2. And it's 1 and 2 as it's also attached to the notice of appeal that G.M. filed with the Board.

That entry states that G.M. has objected to the assessment of "sales tax" on purchases of natural gas during the audit period. It goes on — First of all, you agree that sales tax was not assessed here. It was use tax; isn't that correct?

A. Based on the journal entry, yes. I'd have to look at the Statutory Transcript as far as the original assessment. Yes, it was all use tax.

Q. If you go to pages 94 to 96 of the Statutory Transcript that you are holding there in case no. 91-1558, you find General Motors' petition for reassessment, don't you?

A. Yes.

Q. And if you look on page 95 at paragraph E, that document indicates that General Motors protested the assessment of use tax, not sales tax, doesn't it?

A. Yes.

* * * *

[I-34] * * * *

BY MR. DUFFY:

Q. In each of the journal entries issued by the Commissioner, the Commissioner denied G.M.'s claim of exemption from Ohio

use tax for the natural gas in issue because the vendor or seller was not "a qualified natural gas company." Is that your understanding?

A. From the journal entry here, that's what it says, yes.

Q. And do you want to review the other two journal entries before confirming whether that was the term used in each of the others?

MR. HUBBARD: Your Honor, I will stipulate to the journal entries referred to "qualified natural gas companies."

MR. DUFFY: I would like to make sure that this witness understands that that is the term that was used, not that counsel does.

THE EXAMINER: All right.

Mr. Boeder, do you need to refer to the other two Statutory Transcripts to review those final orders as well?

THE WITNESS: If I am going to say yes, I think I should.

[I-35] (Pause.)

Page 1 says — each one says "qualified natural gas company."

BY MR. DUFFY:

Q. What is meant by the term "qualified natural gas company" as used in those journal entries?

A. I assume that the writer of the journal entry means by "qualified" that the seller of the natural gas owns the transportation facilities which transport the natural gas to its customers.

Q. Why do you qualify your response by saying you assume?

A. There is no definition of qualified natural gas company that I am aware of.

Q. You would agree then that the response to this question is different from the response that you gave me during your deposition, wouldn't you?

A. I would have to look at the deposition.

Q. I am referring you to deposition pages 11 and 12. The words are a little bit different, but it's substantially the same.

My comment or question to you — really not a comment. The question goes to the fact — the difference lies in the fact that you did not indicate previously that this term is not defined anywhere.

[I-36] A. I indicated in that one that I assumed it meant — I assumed it meant natural gas; that the term meant someone who distributes the gas through its pipelines.

MR. DUFFY: Could you read back his response to my question as to what is meant by the term "qualified natural gas company"?

(Thereupon, the response was read.)

BY MR. DUFFY:

Q. Are you using the term "distribution" and "transportation" synonymously then?

A. Yes.

* * * *

[I-38] * * * *

Thereupon, Appellant's Exhibit No. 2 was marked for purposes of identification.

Q. Mr. Boeder, I've handed you what has been marked as Exhibit 2. I will tell you it's a copy of a portion of the Ohio Revised Code Section 5739.02. I have marked this as an exhibit solely because I want you to refer to the language in subdivision (B)(7) of that code section. I'm not interested in any other language in any other subdivision that might be contained in that

exhibit. Is this the version of 5739.02(B)(7) that was in effect during the audit period for these [I-39] cases?

A. Substantially, yes.

Q. What is different about it?

A. Well, I believe during the early — sometime before the end of '89, there was a term — They had artificial gas and a few other things up in the top as well.

Q. In 5739.02(B)(7) —

MR. HUBBARD: Your Honor, may we go off the record.

THE EXAMINER: Certainly.

(Discussion off the record.)

THE EXAMINER: Back on the record.

BY MR. DUFFY:

Q. Mr. Boeder, aside from the fact that sometime during the audit period the exemption might have also included sales of artificial gas by a gas company as one of the types of transactions that would be exempt, would you agree that the statute reads essentially the same during the entire audit period —

A. Yes.

Q. — as it does in the document before you?

A. Yes.

MR. HUBBARD: May we go off the record briefly again.

[I-40] THE EXAMINER: Sure.

(Discussion off the record.)

THE EXAMINER: Back on the record.

BY MR. DUFFY:

Q. You agree, don't you, that one of the statutory requirements for natural gas to be exempt from the Ohio sales tax or the Ohio use tax is that the person who sells the natural gas be a natural gas company as that term is defined in Section 5721.01 (sic) of the Revised Code.

A. 5727.01, yes.

Q. My last question to you should have referred to Section 5727.01.

Just for clarification, you agree that one of the statutory requirements in R.C. 5739.02(B)(7) for natural gas to be exempt from Ohio sales or use tax is that a person who sells the natural gas be a "natural gas company" as that term is defined in 5727.01?

A. Yes.

Thereupon, Appellant's Exhibit No. 3 was marked for purposes of identification.

Q. I hand you what's been marked as Appellant's Exhibit 3. I have marked this exhibit because I want [I-41] you to focus on the definition of natural gas company which is found in subdivision (D)(4) of this statute.

Do you agree that that definition of a natural gas company is the same definition that was in effect during the audit periods in issue here in these appeals?

A. Yes.

Q. There may have been some changes in the numbering of the statute. In other words, it may have appeared in subdivision (D)(8) during a part of the period. Aside from the renumbering, the definition itself remains the same?

A. Yes.

Q. Is this the definition of a natural gas company that was applied here by the Commissioner to determine that Mobile Natural Gas Company was not a qualified natural gas company?

A. Yes.

Q. The Commissioner does not dispute the fact that G.M. did purchase the natural gas that has been assessed here. And by "purchase," I am using that term as you find it defined in R.C. 5741.01(D).

A. It was not.

Q. The Commissioner also agrees that G.M. used the natural gas in issue here for purposes of either [I-42] heating its facilities in Ohio or for providing some type of power or energy source for its manufacturing operation conducted at those Ohio facilities?

A. Yes. The gas was used for those two purposes.

Q. The Commissioner's basic disagreement here is that the persons from whom G.M. purchased the natural gas in issue were not "supplying" the natural gas as that term is used in 5727.01(D)(4); isn't that correct?

A. Yes.

Q. How does the Commissioner define the term "supplying" as used in a statutory definition, at least for purposes of applying the sales tax exemption contained in 5739.02(B)(7)?

A. Supplying was considered to be transporting natural gas to customers through transportation facilities of the seller.

Q. Where does the transportation have to occur; from what point to what point? Just any transportation at all will do?

A. Well, the customer was an Ohio transportation company in Ohio.

Q. How much transportation has to occur?

A. How much?

Q. Yes. Does it have to be done solely by the company?

[I-43] A. It would have to be done by the company, yes.

Q. My question was would it have to be done solely by the company, or could it be done partially by the company and partially by some other person?

A. It would have to ultimately be transported by the company.

Q. You indicated earlier that the transportation of natural gas is one of the criteria here. You're saying that supplying now involves transportation, and that the ownership or control of the transportation facilities must be the seller's. What exactly is meant by "transportation"?

A. Delivery of gas.

Q. In this case, does delivery mean to the G.M. facility where it's going to be used or consumed?

A. Yes.

Q. Is that true in all instances where the statute is applied that the gas has to be delivered by the seller to the place where it's going to be used or consumed by the consumer?

A. To be a natural gas company?

Q. Yes.

A. Yes.

Q. Are there any definitions of the words "supplying" that the Commissioner has promulgated; any [I-44] rules or regulations?

A. To my knowledge, no.

Q. If G.M. purchases natural gas from a person outside the State of Ohio and that natural gas is delivered to General Motors by the seller to someplace outside the State of Ohio. And thereafter, General Motors arranges to have it transported to its facilities in Ohio through the means of some type of transmission company and/or distribution company that operates in Ohio, is there

anyway that that gas will qualify for exemption from taxation under 5739.02(B)(7)?

A. Not under that provision, no.

Q. And is that because the seller did not distribute it or transport it to General Motors in Ohio?

A. Through its facilities, that's right.

Q. Through facilities that it owns or controls?

A. (Witness nodded.)

THE EXAMINER: Mr. Boeder, for purposes of the record, if could you indicate either yes or no.

THE WITNESS: Oh, I'm sorry. Yes.

THE EXAMINER: Thank you.

BY MR. DUFFY:

Q. Are you familiar with the exemption provision in [I-45] Section 5741.02(C)(2)?

A. Is that the section regarding sales and use if it's not taxable under sales or use taxes?

Q. Let me hand you a copy of Page's Ohio Revised Code. I'd ask you to look at Section 5741.02 and specifically the language in division (C)(2).

A. Yes.

Q. What does that statute say regarding the fact that the Ohio use tax does not apply to certain types of transactions? What type of transactions are described in division (C)(2)?

A. If the sale was not subject to tax imposed by Sections 5739.01 through 5739.31 of the Revised Code, it wouldn't be subject to use tax.

Q. Doesn't this section actually say "tangible personal property or services, the acquisition of which, if made in Ohio, would not

be subject to tax imposed by Section 5739.01 to 5737.31 of the Revised Code"?

A. Yes.

* * * *

[I-52] * * * *

BY MR. DUFFY:

Q. Mr. Boeder, you agree that General Motors purchased this gas in issue outside the State of Ohio; is that correct, under a contract with Mobile Natural Gas?

A. I have not seen the contract.

Q. What do you mean you haven't seen it? You haven't had the occasion to read it?

A. I did not read it, no.

Q. I provided your counsel with copies of all of these contracts last week. You haven't looked at any of them?

A. No.

Q. You haven't looked at the ones in the Statutory Transcript either?

A. No.

Q. Why was the assessment issued here? I am asking you that question as the supervisor of the person who made the recommendations.

A. Because the natural supplier of the gas is not considered a natural gas company in Ohio. It doesn't own transmissions, or transportation facilities through which — the pipes through which the gas is transported.

[I-53] Q. You agreed with me previously to one of my questions that this gas was purchased within the meaning of 5741.01(D), did you not?

A. Yes.

Q. But you don't know whether it was purchased in Ohio or outside of Ohio?

A. The reason I don't know that is because on all direct pay audits, we assess based on — we assessed all of the audits as use tax.

Q. That's not true here. Two of these cases involved sales tax assessments.

A. Well, the present policy is to do that. So I did not — I did not look at those. I thought the numbers that you showed me were use tax.

Q. They are.

MR. HUBBARD: Your Honor, may we go off the record briefly.

THE EXAMINER: Briefly.

(Discussion off the record.)

THE EXAMINER: Back on the record.

THE WITNESS: Apparently it wasn't, because this sales tax is issued in some of this.

BY MR. DUFFY:

Q. So you're here as the Commissioner's witness, but you don't know — you have no information about the [I-54] nature of any of the transactions that were assessed here?

MR. HUBBARD: With respect to?

MR. DUFFY: Natural gas.

THE WITNESS: When title passes, I am not familiar with it. I did not read that information.

BY MR. DUFFY:

Q. All right. Assume that the record will reflect through the testimony of other witnesses that the gas was purchased outside of Ohio pursuant to a written contract, and that the seller transferred title and possession to General Motors at a specific place outside the State of Ohio. What if that had occurred in Ohio, would that be a sale exempt from the sales tax?

A. No, only if it were used in an exempt manner.

Q. Why wouldn't it be exempt from the sales tax?

A. Under (B)(7)?

Q. Yes.

A. Because there are gas marketers in Ohio that sell natural gas without transporting it.

Q. They transport it to the consumer at the time and place where title passes. What else is necessary for a sale other than transfer of ownership and possession?

[I-55] A. To qualify, it needs to — you have to be a natural gas company for the sale to be exempted under (B)(7).

Q. And what else is entailed other than transferring title and possession at some point?

A. If you are not a natural gas company, we pick up —

Q. I know, but a natural gas company is supplying — you said that's supplying the natural gas. If the seller transfers title of the gas and possession of the gas to the consumer at a certain point in Ohio, this sale has been consummated, hasn't it? If in fact —

A. Yes.

Q. — General Motors might cause that gas to be transported from the place where it took delivery from the seller to some other place, that somehow makes it not exempt from taxation?

A. That's not our position.

Q. What is your position?

A. Our position is that the natural gas must be sold by a natural gas company.

Q. Can an out-of-state seller of natural gas — can natural gas purchased from an out-of-state seller of natural gas and delivered to a consumer outside the State of Ohio ever qualify for exemption from the Ohio [I-56] use tax if it was stored or used by the consumer in Ohio in some other taxable manner?

A. No, it could not.

MR. HUBBARD: John, just for purposes of clarification.

MR. DUFFY: No, we are not going to do clarification on the record. We are not going to do it unless —

MR. HUBBARD: All right. You were referring to the (B)(7) exemption, right?

MR. DUFFY: Yes.

MR. HUBBARD: The question then was qualified that way?

MR. DUFFY: Yes.

Thereupon, Appellant's Exhibit No. 4 was marked for purposes of identification.

BY MR. DUFFY:

Q. Mr. Boeder, I'm going to hand you Appellant's Exhibit 4. Again I would note that it is a copy of Revised Code Section 4905.03. I am handing it to you because I am interested specifically in the definition of a natural gas company that appears in subdivision (A)(6) of that statute.

[I-57] You would agree that this definition as it begins initially is identical to the definition of a natural gas company that you find in 5727.01 of the Revised Code, and specifically I am referring to the language in 4905.03(A)(6) that defines the natural

gas company to be someone who is engaged in the business of supplying natural gas for lighting, power or heating purposes to consumers within the state. That language is the identical language in 5727.01?

A. Yes.

Q. Does the department draw any distinctions between the exemptions in 4950.03(A)(6) that are contained in there? In other words, 5749.03 states that, "The Commissioner may, upon application, relieve any producers of natural gas defined in this section as a gas company or natural gas company from compliance, so long as the producer does not engage in the distribution of natural gas to consumers."

Does the Department of Taxation or the Commissioner draw a distinction between producers used there in that definition and producers who might sell natural gas that is subject to assessment in Ohio?

A. I can't answer that yes or no.

Q. Your subpoena required that you bring with you today a list of qualified natural gas companies that [I-58] were known to the Commissioner during the years 1987 through 1991. Do you have that?

A. We have a list, yes.

* * * *

[I-66] * * * *

Q. Do you have a list showing the identity of persons who are qualified as natural gas companies during these years?

[I-67] A. We have a list of people who filed gross receipts tax for natural gas.

Q. And are those companies all considered to be qualified natural gas companies as that term was used in the journal entries?

A. To my knowledge, that would be yes.

Q. Do you have that list with you here?

A. I don't have it. It's over there.

Thereupon, Appellant's Exhibit No. 5 was marked for purposes of identification.

Q. Mr. Boeder, I'm going to hand you what's been marked as Appellant's Exhibit 5 and ask you to identify that document.

A. It is a list of companies that filed public utility excise taxes for natural gas.

Q. There is a list of names on the document that comprises two pages; is that correct?

A. Yes. Some of them are repeats.

Q. Some of them are what, please?

A. It's just 1987 all by itself, and there is 1991 through 1988.

Q. That first page contains a listing of companies [I-68] that filed gross receipts tax returns as natural gas companies only during the years 1988, 1990 and 1991 or 1990, 1991. The second page contains a list of those companies that filed gross receipts tax returns as natural gas companies for the year 1987; is that correct?

A. That's correct.

Q. And is CNG Development Company on there for any of the years?

A. Yes.

Thereupon, Appellant's Exhibit Nos. 6 and 7 were marked for purposes of identification.

Q. Mr. Boeder, I have handed you Appellant's Exhibits 6 and 7 and I'd ask if you can identify those two documents.

A. These are journal entries by the Tax Commissioner.

Q. Who is the named taxpayer on those documents?

A. CNG Development Company.

THE EXAMINER: Mr. Boeder, simply for purposes of identification for the record, could [I-69] you indicate the certificate of determination number for Appellant's Exhibit 6?

THE WITNESS: 86-04042.

THE EXAMINER: Thank you. And could you identify for the record the certificate of determination number that appears on Appellant's Exhibit 7?

THE WITNESS: 85-07372.

THE EXAMINER: Thank you, Mr. Boeder. Please excuse the interruption.

Mr. Duffy, you may proceed.

BY MR. DUFFY:

Q. Mr. Boeder, in both of these journal entries, the Commissioner notes that the taxpayer does not own or operate any transmission or transportation pipelines other than incidental supply lines for production and gathering. Yet it finds in both of the journal entries that it should be assessed as a natural gas company under 5727.38 for excise tax purposes. Therefore, at least in the case of one company, the Commissioner has made a determination on the record that owning transmission or transportation facilities isn't essential to a natural gas company.

* * * *

[I-81] * * * *

THE EXAMINER: We'll take a brief [I-82] recess. We'll reconvene at 4:25.

(Recess taken.)

THE EXAMINER: Mr. Boeder, you can come back up. Unless Mr. Duffy and Mr. Hubbard are both willing to conclude your examination.

MR. DUFFY: No. We want him back.

THE EXAMINER: Well, I tried.

(Laughter.)

MR. DUFFY: Do you have the last question that I asked him.

(Thereupon, the question was read.)

BY MR. DUFFY:

Q. Yes. Well, I guess it should read "is not essential to being categorized as a natural gas company."

A. Apparently in looking at this, the writer of this journal entry determined on what basis and made that determination.

Q. Mr. Boeder, I want to clarify something regarding the Commissioner's policy, so we understand today just exactly what your testimony has been. Do you have natural gas service at your home?

A. Yes.

Q. Do you have a line that runs from the curb or [I-83] someplace on the property, a line into your home?

A. Yes.

Q. Is that your line or does it belong to someone else?

A. The line from the street is mine up to the meter.

Q. You have talked about delivery or transportation or the distribution or transportation of the gas as being a criteria for being a natural gas company; is that correct?

A. Yes.

Q. When you talk about delivery or transportation of the gas by the seller, I take it that you are talking about a place where it is ultimately used or consumed by the consumer and not where title or possession may pass before the consumer might have it transported someplace else; is that right?

A. Yes.

Q. So in the case of General Motors Corporation, these three facilities you are talking about is some point where a local distribution line would connect up to its own lines; the lines that it owns at the plants?

A. Yes.

Q. Do you know what a pipeline company is as defined in 5727.01?

A. Yes.

* * * *

[I-84] * * * *

Q. How did you determine if you know what a pipeline company is, Mr. Boeder?

A. I reviewed your Appellant's Exhibit 3, which is Section 5727.01.

Q. Okay. If you didn't have that in front of you, would you have answered no to my question?

A. I may have been less positive about it.

Q. Okay. A pipeline company doesn't distribute or transport natural gas to the end user or consumer, does it?

A. To my knowledge, it transmits natural gas for [I-85] distribution companies among others.

Q. Then distribution companies pick up, and a distribution company is a natural gas company that actually transports it to the place where it is ultimately used by the consumer or passes to the consumer's lines at the place where it's going to be used?

A. Yes.

Thereupon, Appellant's Exhibit No. 8 was marked for purposes of identification.

Q. Mr. Boeder, I am going to hand you what's been marked as Appellant's Exhibit 8, and I would ask that you refer back to what is found at pages 168 and 169 and 170 of that document. The provisions that were stated to be from Sections 5741.30 of the Revised Code and 5747.31 of the Revised Code, and 5747.32 of the Revised Code.

In your prior deposition, I asked you about this, and you told me that you were aware that these provisions had been in House Bill 904 as originally introduced; is that correct?

A. Yes.

[I-86] Q. And you told me that you didn't personally have any involvement in drafting these sections, but someone else in the Department of Taxation did; is that right?

A. Yeah.

Q. And that person was John Schmarr?

A. If it were somebody in the Department of Taxation, it would have been John.

Q. Okay. He is no longer with the department today?

A. That's correct.

Q. You have stated something in your answer that puzzles me. Are you saying that you do not know whether anybody in the Department of Taxation actually had any involvement in this?

A. I am sure that someone in the department would have involvement in it. Whether it was all drafted in the department or outside of the department, I have no knowledge as to that.

Q. Okay. You and I agree that these particular proposed sections of the Revised Code were never enacted in House Bill 904; is that correct?

A. That's correct.

Q. I have one final question.

Could you find anything in the Statutory Transcript that would indicate whether the agent who conducted these audits ever inquired of General Motors [I-87] Corporation as to from whom they purchased the natural gas that was assessed?

A. I don't recall if it was in there. The only thing I have see are the materials since — the materials since the appeal was filed.

MR. HUBBARD: Mr. Boeder, could you speak a little louder. I can't hear you.

THE WITNESS: The only reference that I saw to it was in the material that's after the assessment, after the assessment was issued.

BY MR. DUFFY:

Q. Is it true that once the agent determined that the natural gas was not purchased in Ohio they would conclude that it couldn't qualify for exemption from sales or use tax under 5739.02(B)(7)?

A. Yes.

MR. DUFFY: I have no further questions of the witness.

THE EXAMINER: Thank you, Mr. Duffy. Mr. Hubbard, any questions for the witness?

MR. HUBBARD: Yes, your Honor.

[I-88] REDIRECT EXAMINATION

BY MR. HUBBARD:

Q. With respect to that last question, Mr. Boeder, let me reask you a few questions because I am referring to this particular audit. I am referring to audit policy and application of statutes generally with respect to sellers of natural gas.

A. Yes.

Q. Okay. If title to natural — First of all, for purposes of determining what a seller of natural gas is, a natural gas company, under the sales tax exemption in 5739.02(B)(7), does it matter in what state the title passes from the seller to the consumer?

A. Whether or not title passes in this state or another state is not critical to whether or not the natural gas is taxable.

Q. Does it matter at all?

A. No.

Q. It doesn't. Okay. So in the present case, you read the auditor's remarks in the one audit; is that correct? Or at least the portions of it that Mr. Duffy has shown you?

A. Portions of it, yes.

Q. Did the agent make any statement as to whether the entities or entity that General Motors purchased [I-89] the gas from were brokers?

I refer to page 220 of the Statutory Transcript in 92-510 that Mr. Boeder was previously asked to review.

A. The remarks say from a broker.

Q. So from that, would you infer that, in fact, the agent had made a determination that the gas was purchased from a broker or brokers?

A. That's what the agent said.

Q. Would that be what you would infer also?

A. Yes.

Q. So would it be your inference that he did ascertain that the entities from which the natural gas was purchased by General Motors, he at least inquired as to the nature of the kind of entity that purchased the gas?

A. Yes.

Q. So do you wish to revise your answer where Mr. Duffy asked you the question whether, from your review of your understanding of the files, whether the agent made any inquiries to the nature or the entity of the sellers of the gas?

* * * *

[I-91] * * * *

THE WITNESS: The agents indicate that it was purchased from a broker. I know nothing else besides that.

BY MR. HUBBARD:

Q. Dave, if title to natural gas passed in Ohio from the seller to the buyer, the seller neither own nor controls the facility through which the gas is transported to the buyer, would the sale of the gas be exempt under Resided Code 5739.02(B)(7)?

A. No. If the seller of the natural gas did not own or control the transportation facilities through which the gas was routed, the natural gas would not be exempt [I-92] under the (B)(7) exemption.

* * * *

[I-93] * * * *

Q. Dave, could you define what you mean by "transportation" in the context that we have — that you have testified to?

A. Taking the gas to the customer.

Q. Okay. If the customer has his own private facilities so that the customer receives the gas at some point and then has its own lines, would delivery to the point where the customer then takes it from using his own private lines, would that constitute transportation as you're using it?

A. That would be to the customer, yes.

Q. Okay. If title to the gas passes outside the State of Ohio, but the gas is then delivered or transported in Ohio through the seller's facilities to the customer in Ohio, would that transaction be exempt under Revised Code 5739.02(B)(7)?

* * * *

[I-94] * * * *

THE WITNESS: It would be exempt.

BY MR. HUBBARD:

Q. For sales and use tax purposes, in determining whether sales of natural gas are exempt under Revised Code Section 5739.02(B)(7), what steps are taken by the agent to determine whether the criteria are met?

A. When auditing a seller, the agent would consider the representation of the seller — the representation of the seller, and would subsequently when reviewing the purchase records of the company, verify whether or not the company was or was not a natural gas company in terms of looking at their purchases.

[I-95] Most natural gas companies are required to file under the Federal Energy Regulatory Commission accounts. They may also contact our Public Utility Excise Tax Section of the Department of Taxation.

Q. With respect to consumer audits, and for the Board, could you explain what a consumer audit is versus a sales audit or a vendor audit?

A. A seller audit is primarily directed at someone who is making the retail sales and to whether or not those retail sales, the correct amount of tax has been collected on those retail sales. And if not, whether the taxpayer has proper exemption certificates. A consumer audit is primarily one of the taxpayer's consumption, tangible personal property and services and whether or not he has or she has paid the proper amount of tax on the consumption on those transactions.

Q. With respect to consumer audit, what steps would the agent take to determine whether the criteria for the exemptions are met?

A. When auditing a consumer, if it were — the agent would notice the purchase of natural gas. If they were unfamiliar with the company, the seller of the natural gas, they would contact our Public Utility Excise Tax Division, the section of the Personal Property Tax [I-96] Division, and find out if the companies were registered for Ohio tax purposes.

Q. As what?

A. As a natural gas company.

Q. If the agents were to find information contrary to the position, contrary to the filing of a company as a public utility, as a natural gas company, would they take that into account?

A. They would probably want to confer with the Public Utility Excise Tax Section and find out why or find out the reason why they were treating a transaction one way that they did and their filing status.

Q. Okay. If, in fact, let's suppose a company that's a seller of natural gas is found out by the sales and use tax auditing agents not to be under control of the facilities over which the gas is delivered to the consumer and is a marketer or a broker, would they deny the exemption to that company?

A. The (B)(7) exemption?

Q. Yes.

A. Yes.

Q. Mr. Boeder, have you ever — in your testimony, you testified you're a sales and use tax agent. Have you ever been an agent in the Public Utility Tax [I-97] Section?

A. No.

Q. How would you characterize your familiarity with public utility taxes?

A. More passing than what I would call knowledgeable.

Q. So you would not consider yourself knowledgeable in public utility taxes in general?

A. Yes.

Q. Appellant's Exhibit 5 has been identified as a list of companies that filed public utility tax returns for 1987 through 1991; is that correct?

A. Yes.

Q. Okay. Do you have any knowledge as to whether any of those particular companies, in fact, do satisfy the statutory requirements for a natural gas company as defined for public utility taxation purposes?

A. Yes. Two of them.

Q. What are those two?

A. East Ohio Gas Company, and Columbia Gas of Ohio, Inc.

Q. Are there any other companies that you know meet the statutory criteria?

A. Not for certain, no.

* * * *

[I-102] * * * *

Q. Mr. Boeder, could you state what a marketer of natural gas is? And if I may modify that to a marketer or broker of natural gas.

A. Someone who sells natural gas, but doesn't take any part in the delivery or transportation to its customers.

Q. When you say "doesn't take any part in," what are you talking about?

A. Physically transporting the gas to the customer.

Q. If an entity arranged for others to do the transportation, could they still be a marketer or a broker?

A. If they arranged for someone else to?

Q. Yeah.

A. Yes.

* * * *

[I-103] * * * *

Q. For purposes of the Tax Commissioner's application of Revised Code 5727.01(B)(7) and Section 5727.01(E)(4), is a marketer or broker of natural gas a "natural gas company" within the meaning of Revised Code 5727.01(E)(4)?

A. No. We don't consider a marketer of natural gas who does not own or control the transportation facilities to transport natural gas to its customers to be a natural gas company. The sale of its gas is not [I-104] exempt under 5739.02.

Q. I can't recall if I asked this question because we had an objection, so I am going to ask it again.

If title to the natural gas passes outside the State of Ohio and then the gas is transported, delivered to Ohio customers within Ohio through trans — through facilities owned or controlled by the seller, would that transaction be exempt under 5739.02(B)(7)?

A. Yes.

Q. Do you know of any situation where the Department of Taxation has determined that a marketer or broker of natural gas did not qualify as a natural gas company so that its sales to Ohio consumers did not qualify for the exemption contained in Revised Code 5739.02(B)(7)?

* * * *

[I-105] * * * *

THE WITNESS: I am aware of at least three situations where we have considered a marketer of natural gas to be selling tangible personal property that's not exempt under (B)(7).

* * * *

[I-108] * * * *

Q. Has the department consistently applied the application of the statute that you have testified to concerning marketers or brokers of natural gas who make sales to Ohio consumers?

A. Yes. Both from the perspective of the marketer, seller as well as auditing consumers.

Q. By that you're referring to the — by "consumers," you're referring to the entities that purchase the gas from the marketers to brokers, correct?

A. Yes. They're companies who purchase such gas from companies that do not have status in Ohio as far [I-109] as the seller is concerned.

Q. By "status," you're referring to nexus contacts with the state so we can impose —

A. Yes.

Q. The Tax Commissioner can impose the obligation upon the seller —

MR. DUFFY: I'm going to object.

BY MR. HUBBARD:

Q. — to collect the tax?

A. Yes.

THE EXAMINER: Mr. Hubbard, if you would like to rephrase that to avoid the leading question.

MR. HUBBARD: I am just trying to — he is not an attorney. Instead of nexus, he used status.

THE EXAMINER: If you can ask the witness simply what he means by "status."

THE WITNESS: I mean that's — I didn't want to use the word nexus. It's the nexus which says we would not have the authority to make an assessment against the company.

BY MR. HUBBARD:

Q. With respect to purchases and sales of natural gas, are there instances when you would assess a seller [I-110] and in other instances when you would assess the consumer?

A. Yes.

Q. Could you state for the Board those situations where you would assess the consumer?

* * * *

[I-111] * * * *

THE WITNESS: As stated, there are certain taxpayers in the state that have direct-pay authority. They do not pay tax to their suppliers. They make a determination after the purchase as to whether that purchase is taxable or not.

There are also consumers who indicate to the seller that their purchases are not something to tax. They provide the exemption certificate. So the seller is not responsible for collecting tax in that case, and we would go after the consumer if it were a taxable use.

BY MR. HUBBARD:

Q. And I believe you also already testified to the situation where the seller is outside the State of Ohio and there is a sufficient nexus?

A. Right.

Q. And in that situation, you would assess the consumer?

A. Yes.

MR. HUBBARD: Counsel for Appellant, Mr. Duffy, has provided him with copies of [I-112] contracts that I believe he will have testimony on between General Motors and the seller of the natural gas.

One of those entities is an entity by the name of Yankee Resources, now known as Access Energy. So I would like to ask the witness a specific question about Access Energy and whether we have had any sales and use tax assessments arising from sales of or purchases or sales by or purchases from Access Energy.

MR. DUFFY: I'm going to object. I have asked this witness if there is anything in the record that shows who the seller of the natural gas was and he couldn't point to anything. So the Commissioner was implying about facts that aren't in evidence yet in this case.

MR. HUBBARD: Your Honor, it's not that they are not in evidence yet, but we have the contracts and Mr. Duffy has provided me with them, so that they come from the Appellant. I have no reason to believe, unless he is saying now that those weren't — that General Motors didn't have contracts with Access Energy or Yankee Resources, the name was changed during the audit period.

MR. DUFFY: No, we aren't saying that. I am just pointing out the fact for the record [I-113] that at no time did any of these agents ever ask to see who we bought the gas from. We are going to get into this on some of Mr. Boeder because you have gone through a whole list of criteria here about what agents do to

determine whether or not gas is taxable. I want to find out from this witness just exactly what agents inquired of what companies.

BY MR. HUBBARD:

Q. Mr. Boeder, if a particular taxpayer doesn't — First of all, what is the Tax Commissioner's position as to who has the affirmative burden of proof of establishing entitlement to the exemption set forth in Revised Code Section 5739.02(B)(7)?

A. The taxpayer.

Q. If the taxpayer doesn't provide the names of the sellers, would that be part of their failure to affirmatively meet their burden of proof?

A. Yes. To the agent, yes.

THE EXAMINER: Excuse me, Mr. Boeder. Could you speak up just a little?

THE WITNESS: Yes.

BY MR. HUBBARD:

Q. In this case, do you know one way or the other whether the names of the sellers were provided to the agents?

[I-114] A. I do not.

Q. We return to my question regarding Access Energy. Do you have knowledge of sales and use tax assessments that have been issued with respect to sales by and purchases from Yankee Resources, Inc. or Access Energy?

* * * *

[I-115] * * * *

THE EXAMINER: I will overrule the objection and allow the witness to testify subject to subsequent — at this point there's been no testimony [I-116] that there have been any purchases by the Appellant from either Yankee Resources or Access Energy. However, I will allow the testimony subject to that qualification.

THE WITNESS: Would you repeat the question, please.

MR. HUBBARD: Could the court reporter read my question.

(Thereupon, the question was read.)

THE WITNESS: Yes. Is that sufficient, or do you want me to expound?

BY MR. HUBBARD:

Q. Could you give some general explanation as to the circumstances? Did they include both sales audits and purchase audits?

A. My personal knowledge was involving the sales audits.

Q. Do you also have knowledge in the ordinary course of your employment with respect to what your division does?

A. I wouldn't know of any. I know that natural gas is picked up on consumers. Whether or not as Access Energy was supplying in that particular case, that I don't know.

Q. Okay.

[I-117] A. But the seller of natural gas was examined.

Q. So what you're saying is Yankee Resources, Inc. and/or Access Energy was assessed as a seller of natural gas?

A. Access Energy was, yes.

Q. And that was on their sales of natural gas to Ohio consumers?

A. That's correct.

Q. And on what basis did the Tax Commissioner assess them?

A. For failure to collect tax on transfer of tangible personal property and failure to support that with either an exemption certificate or a valid letter of usage.

Q. Was there a determination made as to entitlement to any exemption under Section 5739.02 (B)(7)?

MR. DUFFY: I'm going to object unless the witness establishes that he is talking about all out-of-state sales as opposed to in-state sales.

BY MR. HUBBARD:

Q. Regardless of whether title passes in-state or out-of-state, would it make any difference? Did it make any difference in that particular audit?

A. No.

Q. So in other words, regardless of whether the [I-118] title passed in Ohio or passed say in Texas from Access Energy to the consumer, the tax was imposed?

A. Yes.

Q. In both situations?

A. Yes.

Q. Did you answer the question with respect to whether there was a determination made as to whether Access Energy was entitled to the exemption under 5739.02(B)(7)? If not, I am asking the question again.

A. We did not exempt any of their sales under that exemption.

Q. And why didn't you?

A. Because we didn't consider them to be a natural gas company.

Q. And why was that?

A. Because they did not transport natural gas through their transportation facilities to their customers in Ohio.

Q. That is they didn't deliver it to the Ohio company; is that right?

MR. DUFFY: Objection.

THE EXAMINER: Mr. Hubbard, if you can refrain from leading the witness.

MR. HUBBARD: Okay.

BY MR. HUBBARD:

[I-119] Q. As you have defined the term "marketer," or "broker" of natural gas, would Access Energy fit that category —

A. Yes.

Q. — determined by the Tax Commissioner?

A. They were considered a marketer or broker, yes.

MR. HUBBARD: I have no further questions at this time, your Honor.

THE EXAMINER: Thank you, Mr. Hubbard.

Mr. Duffy.

RECROSS-EXAMINATION

BY MR. DUFFY:

Q. Mr. Boeder, just a few questions.

When you were referring to the Statutory Transcript, page 220, you were talking about the agent's remarks there and how he characterized the purchases as being from a broker.

Those remarks only apply to one of the three assessment, don't they?

A. That was what I was referring to, yes. I did not look at the other two in terms of how the others were characterized. The one I was looking at was the one referring to Central Foundry Division.

[I-120] Q. Do you know who the companies are that were characterized as brokers in that remark?

A. Neither the remarks nor the sheet on which the assessment was made indicate who they are.

Q. During your testimony today, you have referred to the transportation of natural gas and transportation facilities. In your deposition, you agreed with me that the term "supplying" as used in 5727.01(D)(4) was synonymous with the term "distribution." If a company was not distributing natural gas or did not have a distribution facility in Ohio, it was not a natural gas company. Today you have been very careful only to use the terms "transporting" and "transportation," not distribution.

Are you somehow making a distinction now that someone who does not own a distribution facility or does not distribute natural gas is different from someone who doesn't have transportation facilities or does not transport natural gas?

A. I guess transporting seem to be a better term.

Q. Okay. But you are not specifically omitting any reference to the phrase "distribution" because Section 4905.03 of the Revised Code in defining natural gas companies talks about those companies being relieved [I-121] from certain obligations and compliance with statutory requirements of the public utility laws. They don't engage in the distribution of natural gas.

A. That was not my intention, no.

Q. You indicated that one of the steps that an agent would do in a consumer use tax audit would be to identify who the sellers of the natural gas were that sold the gas to the consumer and contact the Public Utilities Section to find out whether those sellers were filing gross receipts tax returns in Ohio. Was that done in these three cases?

A. It does not appear to be on the one that I am looking at.

Q. Do you know if it was done in the other two cases?

A. I cannot tell without looking.

Q. Okay. Do you want to look and tell me whether you can determined whether it was done?

A. (Witness complies.)

In the one involving Packard Electric, there is no specific reference to any particular supplier.

(Pause.)

MR. HUBBARD: If Mr. Boeder could identify the pages of the Statutory Transcript he is referring to. In B.T.A. case no. 92-E-1558, the [I-122] compliance letters prior to that are at 110 of that Statutory Transcript.

MR. DUFFY: I'm not limiting the agent to any particular pages in the transcript. I am asking him to look at the entire transcript.

MR. HUBBARD: Well, that's where the —

THE EXAMINER: You can clarify that if you would like.

MR. HUBBARD: I am assisting the witness. Reference has been made to the Commissioner's remarks, and in these —

MR. DUFFY: No, it wasn't. My question didn't go to the Commissioner's remarks. It was as to whether or not the criteria that he listed for doing a consumer's use tax audit were applied or one criteria was to identify who the suppliers of the natural gas were as he characterized it, and find out whether or not they filed gross receipts tax returns with the Public Utilities Commission. I'm trying to determine whether that policy was carried out here in these three audits.

MR. HUBBARD: Well, what he's testified to is if he had the name of it, then he would consult with them. To the extent the company doesn't [I-123] provide the names, obviously he can't do that.

MR. DUFFY: He just said the policy was to determine who the suppliers were and then make the inquiry. I am asking him about whether that policy was carried out here.

THE EXAMINER: Mr. Duffy simply referred Mr. Boeder to the entire transcript in all three appeals. If you, Mr. Hubbard, feel it's necessary to direct Mr. Boeder's attention on your examination to specific pages, you may do so.

MR. DUFFY: The only reason I did is he said he could not tell whether the policy — He said the policy was not that no inquiry was apparently made. He cannot find any evidence in the Statutory Transcript in 91-1558.

MR. HUBBARD: No, that's not what he says.

MR. DUFFY: Exhibit B, 92-510. This was done.

MR. HUBBARD: Other than the preference to brokers.

MR. DUFFY: The question was, Bart, whether or not the agents actually called up the Public Utility Tax Division and asked whether any of these companies that General Motors purchased natural [I-124] gas from were filing gross receipts tax returns with the State of Ohio. He is saying that that policy wasn't implemented or that was not done in the case of 92-510.

MR. HUBBARD: Well, if the company itself is not contesting that fact, then they don't necessarily — they are saying they are outside brokers that don't file. Why would you call to confirm that?

THE EXAMINER: Mr. Duffy, you have given the witness an opportunity to review the Statutory Transcript to respond to your question. At this point, there is no objection. You're asking him simply to respond to the question. Within your examination, Mr. Hubbard, you can clarify.

MR. HUBBARD: Okay.

THE WITNESS: Do you want me to read this whole thing?

THE EXAMINER: Mr. Duffy.

BY MR. DUFFY:

Q. You said you would not be able to tell me whether or not the policy was carried out in the other two audits without reviewing the entire — without looking through the transcript. I said would you do that.

I didn't open up the question of what the audit policy was; counsel for the Commissioner did.

[I-125] I would like to know whether the policies that are supposed to be implemented regarding the consumer's use tax audit on purchases of natural gas were applied here.

MR. HUBBARD: I wouldn't characterize it as a policy. That's not the way it was characterized. There are steps that are maybe taken on an audit. There is no formal policy that's set forth. Every agent has his own way of doing something. These are steps that may be taken.

(Pause.)

THE WITNESS: Based on my review of the remarks, I do not believe the Public Utility Tax Section was consulted.

BY MR. DUFFY:

* * * *

[I-127] * * * *

Q. Mr. Boeder, you provided a list of companies that filed excise tax returns as public utilities during the years '87 through '91 as natural gas companies, and it has been marked as Exhibit 5; is that correct?

A. Yes.

Q. Do you have any information today that there were any companies on that list that filed returns for any years that should not have because they weren't natural gas companies?

[I-128] A. I do not have that information, no.

Q. Okay. Are you here testifying that that list contains companies that did file returns as natural gas companies when they shouldn't have?

A. I have no personal knowledge of that.

Q. Okay. Does the Department of Taxation, actually during the course of an audit of a company for gross receipts tax purposes, determine whether that company should be filing returns as a natural gas company?

A. I can't answer that question.

Q. All right. How about when companies file corporate franchise tax returns. Do you have any knowledge whether the department audits the persons who filed those returns to determine whether or not they should even be filing gross receipts tax returns as a public utility rather than a corporate franchise tax return as a general business?

A. I have no knowledge of that either.

MR. DUFFY: Okay. I have no further questions of the witness.

THE EXAMINER: Thank you, Mr. Duffy.

Mr. Hubbard, any further questions of Mr. Boeder?

MR. HUBBARD: Yes, your Honor.

[I-129] FURTHER REDIRECT EXAMINATION

BY MR. HUBBARD:

Q. Dave, just briefly. Could you tell the Board what your educational background is?

A. Starting when?

MR. DUFFY: I don't have any objection.

BY MR. HUBBARD:

Q. College.

A. I went to Ohio State from 1965. I went one year to Wisconsin State University, Eau Clair, and then three years at Ohio State University. I have a B.S. in Finance, and a Master's Degree in Business Administration from Ohio State.

Q. Do you have any professional certifications?

A. No.

Q. I'd like to refer your attention to the audit remarks in 92-146 and specifically to page 154.

MR. DUFFY: If you're going to do that, I would like my copies back. You can give him yours.

BY MR. HUBBARD:

Q. I direct your attention specifically to the last sentence prior to the summary. Could you read that please for the record.

[I-130] A. "Tax due on natural gas purchases from non public utility suppliers was then computed and listed with tax due on assets for the audit period."

Q. Does that indicate to you that the agent made some inquiry with respect to the nature of the seller of the natural gas?

* * * *

[I-131] * * * *

THE WITNESS: The agent indicates that the natural gas was not purchased from a public utility.

* * * *

Q. Let me ask you this question. In your experience, do agents put things in the remarks that they don't know are true and just speculate without any concrete basis?

* * * *

[I-132] * * * *

THE WITNESS: Typically the agent would find out from whom things are purchased.

BY MR. HUBBARD:

Q. So your answer is that the agent — The specific question was, in making factual statements in a case, will an agent have some factual basis for those statements? What is your answer to that?

* * * *

[I-133] * * * *

THE WITNESS: Yes.

Q. Who is the agent in that case?

A. Mr. Lawrence.

Q. Do you generally find him to be objective and to have a factual basis for the statements he makes in his remarks?

A. Mr. Lawrence is not one of my agents. He is an agent from the Youngstown district.

Q. Are you familiar with Mr. Lawrence?

A. Remotely.

Q. So your answer is no. You don't have any basis for saying one way or the other.

I am going to show you another Statutory Transcript. You don't have an opinion of Mr. Lawrence? You don't have enough of a basis?

A. I do not know Mr. Lawrence.

Q. Okay. Do you know his supervisor?

A. His supervisor on this audit was Gerald Sinkovich.

Q. Do you have an opinion as to — do you have personal knowledge as to his review?

[I-134] A. Yes.

MR. DUFFY: Objection. Mr. Sinkovich didn't write the remarks.

BY MR. HUBBARD:

Q. Did Mr. Sinkovich review those remarks?

A. Yes.

Q. Is it your understanding, your familiarity with his work, that he would insist upon a factual basis for his agents' statement in the remarks?

A. Yes.

Q. I'd like to refer your attention to the audit remarks, examiner's remarks in case no. 91-E-1558. Specifically to page 111 of those remarks. I'd like you to read the first sentence under the category "Type of records" for the record, please.

A. "The records made available and examined by the agent included invoices from brokered natural gas purchases."

Q. Is there reference to brokered natural gas purchases to purchases made by General Motors from brokers of natural gas?

A. That's what it says, yes.

Q. Are you familiar with the agent in this case?

A. Yes.

Q. Who is it?

[I-135] A. Bruce Steiner.

Q. Is he supervised by you or was he at the time?

A. Ultimately, but Gerald Sinkovich is his supervisor.

Q. And with respect to statements made in audit remarks by Mr. Steiner, would he, in your experience, have a factual basis for making those statements?

A. Mr. Steiner is very dependable, yes.

Q. So you personally know of Mr. Steiner's work, and you personally state that he would be very reliable?

A. He is a good agent, yes.

Q. If a taxpayer/consumer itself described the transaction where gas was purchase from a broker, would the agents necessarily check with the Public Utilities Tax Division of the Department of Taxation to ascertain whether that entity was filing public utility tax returns?

A. Probably not.

Q. Why is that?

A. Because the taxpayer said that they bought it through a marketer or seller of natural gas.

Q. Do you have any reason to know one way or another whether that's what occurred in this case?

A. I don't have particular knowledge as to what occurred. No.

[I-136] Q. Okay.

A. In terms of whether the agent or agents consulted the PUCO or Public Utilities Tax Division or not.

MR. HUBBARD: Your Honor, I have no further questions of the witness.

THE EXAMINER: Thank you, Mr. Hubbard.

Mr. Duffy, anything further.

FURTHER RECROSS-EXAMINATION

BY MR. DUFFY:

Q. One question.

With regard to the remarks on page 154 of the transcript in case no. 92-146, what is the difference between a non public utility supplier of natural gas and a public utility supplier of natural gas?

A. I don't know what his meaning of the term is in this case. I don't want to speculate.

Q. The term "public utility" isn't used at all in 5739.02,(B)(7), is it?

A. No. Natural goes company is referred to.

MR. DUFFY: Thank you. Nothing further.

THE EXAMINER: Even though you asked two questions, Mr. Duffy.

[I-137] (Laughter.)

Mr. Hubbard, anything further?

MR. HUBBARD: No, your honor.

THE EXAMINER: Okay. Thank you, Mr. Hubbard.

Mr. Boeder, you may step down. Thank you very much.

He was concerned, Mr. Hubbard, you were going to say you had one more question.

(Laughter.)

MR. DUFFY: I would move at this time for the admission of Appellant's Exhibits 1 through 8 into the record.

* * * *

[I-144] * * * *

THE EXAMINER: If I may save the parties some time. I will overrule the objections. Counsel has noted for the Appellant, however, in examination of the witness that certain of Appellant's Exhibits 2 through 4 do not accurately reflect the statute

provisions that were in effect throughout the entire audit period involved in all three of these appeals.

However, subject to that limitation, the documents will be admitted into evidence and received and considered for what weight this Board may deem to [I-145] afford them.

However, the Board will certainly not be bound in its decision by copies of the Revised Code that may have been altered throughout the audit period.

Thereupon, Appellant's Exhibit Nos. 1 through 4 were received into evidence and made a part of the record herein.

THE EXAMINER: Appellant's Exhibit No. 5; Mr. Hubbard, do you have an objection?

MR. HUBBARD: We certainly do, your Honor. That exhibit is the subject of our motion to quash and the memorandum in support.

We obviously renew our objection on the bases stated in the written memorandum in support and any additional bases we may have stated today.

I have nothing further to add from what we already stated on that point.

THE EXAMINER: Thank you, Mr. Hubbard.

Based upon my prior ruling with regard to the motion to quash that has been filed with this Board on May 11th and my ruling that I made at the time testimony was elicited, I will overrule the objection [I-146] and admit Appellant's Exhibit 5 into evidence.

Thereupon, Appellant's Exhibit No. 5 was received into evidence and made a part of the record herein.

THE EXAMINER: Appellant's Exhibits 6, 7 and 8. Nos. 6 and 7, which certificates of determination of the Tax Commissioner. Mr. Hubbard, do you have any objections to them being received into evidence?

* * * *

[I-147] * * * *

THE EXAMINER: To some degree, Mr. Hubbard's objection does go to the weight which this Board should accord to the testimony of the witness who identified Appellant' Exhibits 6 and 7. To that extent the objection is overruled.

With respect to their relevance to this case, as Appellant's counsel pointed out, they are certainly relevant to the position that Appellant is presenting on appeal. I will overrule the objection and allow them to be received into evidence.

Again, these documents will be subject to what weight the Board may deem to accord them.

[I-148] Thereupon, Appellant's Exhibits Nos. 6 and 7 were received into evidence and made a part of the record herein.

THE EXAMINER: Finally, Appellant's Exhibit No. 8 which is House Bill No. 904, Mr. Hubbard.

* * * *

[I-149] * * * *

THE EXAMINER: It's my recollection of the witness' testimony that he was certain that the department or someone from the Department of Taxation had some input, but he could not testify with certainty as to who such individual might be.

I personally do not particularly find this document to have much relevance in this case. However, the Board may disagree with me on that. Therefore, I will overrule the objection and allow it to be received into evidence, subject to the Board's determination, as with the rest of my rulings; that they may find it to be irrelevant and determine that it should be excluded. However, it will be received into evidence.

Thereupon, Appellant's Exhibits No. 8 was received into evidence and made a part of the record herein.

[I-150] THE EXAMINER: Is there anything further at this point prior to our recessing until Friday morning at 9:00 o'clock?

MR. DUFFY: I have nothing.

MR. HUBBARD: No, your honor.

THE EXAMINER: All right.

This Board stands in recess until Friday, May 14th, 1993 at 9:00 o'clock a.m.

Thereupon, the hearing recessed at 6:15 o'clock p.m. on Wednesday, May 12, 1993 to reconvene on Friday, May 14, 1993 at 9:00 a.m.

[II-1] BOARD OF TAX APPEALS

STATE OF OHIO

General Motors Corporation,

Appellant,

vs. Case No. 91-K-1558
Sales and Use Tax

Roger W. Tracy, Tax
Commissioner of Ohio,

Appellee.

General Motors Corporation,
Packard Electric Division,

Appellant,

vs. Case No. 91-K-146

Roger W. Tracy, Tax
Commissioner of Ohio,

Appellee.

General Motors Corporation,

Appellant,

vs. Case No. 91-K-510

Roger W. Tracy, Tax
Commissioner of Ohio,

Appellee.

Friday, May 14, 1993

VOLUME II

[II-2] Hearing Room A
24th Floor
State Office Tower
30 East Broad Street
Columbus, Ohio 43266
Friday, May 14, 1993

Met, pursuant to assignment, at 9:00 o'clock a.m.

BEFORE: Bradford Arnold, Attorney-Examiner.

[II-3] APPEARANCES:

ON BEHALF OF THE APPELLANT:

John C. Duffy, Jr., Esq.
Jones, Day, Reavis and Pogue
North Point
901 Lakeside Avenue
Cleveland, Ohio 44114

ON BEHALF OF THE APPELLEE:

Lee Fisher, Esq.
Attorney General of Ohio

By: Barton Hubbard, Esq.
Assistant Attorney General
Taxation Section
State Office Tower
30 East Broad Street
16th Floor
Columbus, Ohio 43266-0410

ALSO PRESENT: Fred DiIorio
Marilyn A. Wethekam
Paul Ritter

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* * * *

[II-9] Friday Morning Session

May 14, 1993

PROCEEDINGS

Thereupon, Appellant's Exhibit Nos. 9 through 25 were marked for purposes of identification.

THE EXAMINER: We can go on the record.

This is a hearing before the Board of Tax Appeals, State of Ohio, relative to three appeals styled General Motors Corporation, Appellant, versus Roger W. Tracy, Tax Commissioner of Ohio, Appellee having been assigned Board of Tax Appeals case nos. 91-K-1558, 92-K-146 and 92-K-510.

We are reconvening this hearing from a prior date of May 12th, 1993, in Hearing Room A in the offices of the Board of Tax Appeals on the 24th floor of the State Office Tower, 30 East Broad Street, Columbus, Ohio, on May 14th, 1993, at approximately 9:25 a.m., pursuadeponnt to assignment before Bradford P. Arnold, Attorney-Examiner for the Board of Tax Appeals.

For purposes of the record, I will ask at [10] this time that Appellant's representative enter his appearance.

MR. DUFFY: John C. Duffy, Jr., Jones, Day, Reavis and Pogue, North Point, 901 Lakeside Avenue, Cleveland, Ohio, 44114, telephone number 216-586-7145.

THE EXAMINER: Thank you, Mr. Duffy.

Will Appellee's representative please enter an appearance for purposes of the record.

MR. HUBBARD: Good morning, your Honor. Lee Fisher, Ohio Attorney General, by Barton A. Hubbard, Assistant Attorney General, for Roger Tracy, Tax Commissioner of Ohio.

My mailing address is 30 East Broad Street, 16th floor, State Office Tower, Taxation Section, Columbus, Ohio 43266-410. My telephone number is 614-466-5967.

THE EXAMINER: Thank you, Mr. Hubbard.

* * * *

[II-15] * * * *

MR. DUFFY: No. Mr. Freeman is the first witness.

THE EXAMINER: That's fine.

(Witness sworn.)

[II-16] Steven C. Freeman

being first duly sworn, as prescribed by law, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DUFFY:

Q. Mr. Freeman, would you please state your full name for the record.

A. Steven Craig Freeman.

Q. Mr. Freeman, are you currently employed, and if so by whom are you employed?

A. Yes, I am employed by Mobile Natural Gas, Incorporated.

Q. And how long have you been employed by Mobile Natural Gas, Incorporated?

A. I have been employed by Mobile Natural Gas, Incorporated since mid '87 when that corporate entity was established. Prior to that time, I was employed by Mobile Oil Corporation.

Q. What is the relationship, if any, between Mobile Natural Gas, Incorporated and Mobile Oil Corporation?

A. Mobile Natural Gas, Incorporated is a wholly-owned subsidiary of Mobile Oil Corporation.

Q. What is your current position with Mobile Natural Gas, Incorporated?

A. Manager of long-term sales.

[II-17] Q. And what is your current business address?

A. 12450 Greenspoint Drive, Houston Texas.

Q. Would you briefly describe the business engaged in by Mobile Natural Gas, Incorporated?

A. Mobile National Gas, Incorporated is in the business of purchasing from other affiliated Mobile companies and other third-party producers purchasing natural gas and marketing that to our portfolio of customers.

We are able to do this because of changes in regulations. Prior to mid '86, it was the only possible sale that a producer such as Mobile could make would be to an interstate pipeline company. We are now able to — because of changes in the regulations, we are able to market directly to end users, local distribution companies, industrial companies. Mobile decided to get into that business in mid '86.

Q. Is the business of Mobile Natural Gas, Inc. which you have just described any different than it was during the period of time 1987 through 1990 in any significant way?

A. It's the same basic business that we are involved in today.

Q. What are your duties and responsibilities as a manager of long-term sales for Mobile Natural Gas, [II-18] Inc.?

A. I am manager of the long-term sales group. We are charged with the responsibility of selling gas under contracts of a term of longer than one month.

We do this by contacting our customers, our potential customers and determining what it is that they are — what it is that they are needing; what their wants and desires are; submitting proposals to fill those needs; negotiating contracts. When we are successful with those proposals, we administer the sales that occur under those contracts.

Q. Who oversees that operation within the company?

A. I oversee the long-term sales effort.

Q. What is your educational background?

A. I have a Bachelor of Science Degree in Mechanical Engineering from Bucknell University in Lewisburg, Pennsylvania.

Q. Beginning with the date of your initial employment with Mobile Oil Corporation and coming forward, would you please state what positions you held with that company and Mobile Natural Gas, Inc., the period of time that you held each position, and the duties and responsibilities associated with each position?

A. I accepted a position with Mobile Oil Corporation [II-19] upon graduation from college. That position was Junior Marketing Representative. From the period of 1967 to 1968, I was a trainee in the sales department. Our activities consisted of selling commercial and industrial fuels and lubricants to commercial customers.

From the period of 1968 to 1970, I served in the U.S. Army, came back with Mobile.

The period of time from 1970 to 1972, I was a Commercial Marketing Representative, selling commercial and industrial fuels and lubricants to our commercial industrial customers.

The period 1972 through '78 I was a commercial lubrication engineer that provided technical lubrication support to our commercial marketing representatives.

From the period of 1979 through '80, I was involved in the marketing and technical support for our asphalt sales out of Mobile's Augusta, Kansas refinery.

From 1980 to '81, I was chief engineer of the Houston Commercial Division, supervising a number of lubrication engineers that were providing technical support to the Houston Commercial Division's marketing representatives.

MR. HUBBARD: Your Honor, I appreciate that we want to do this quickly, but is the [II-20] witness referring to any documentation? It appears he may be.

* * * *

[II-21] * * * *

THE EXAMINER: May I see the document, please. Please let the record reflect the document to which the witness was referring to for purposes of his testimony includes the dates and the [II-22] positions held and the title of the position. As Mr. Hubbard has noted, this document does not include descriptions.

MR. HUBBARD: That's fine.

THE WITNESS: The period 1981 to 1986, I was industry manager for petroleum coke and had the responsibility for marketing all of Mobile Petroleum's coke production in the United States.

In 1986, I came to Houston, Texas and was one of the initial individuals to enter into the direct marketing of natural gas. I was a sales representative in the '86 to '88 period of time and have been a manager in that organization from '88 to present.

BY MR. DUFFY:

Q. Thank you.

Mr. Freeman, one of the issues in these consolidated appeals involves the assessment of Ohio use tax on natural gas purchased by General Motors Corporation during the period October 1, 1986 through June 30, 1990. Excuse me, December 31, 1990. I may hereinafter refer to that as the audit period.

This gas was purchased by G.M. for use at three of its facilities in Ohio that have been attested to here as the Lordstown, Ohio plant, the Defiance Central Foundry plant and the Packard Electric plant in Warren, [II-23] Ohio.

Would you state whether or not you're familiar personally with any transaction between Mobile Natural Gas and/or any other Mobile affiliates in G.M. during this audit period involving purchases of natural gas, and if you would, explain how you happen to be familiar with those transactions.

A. I am familiar with several contracts during that period of time under which Mobile sold gas to General Motors for use in those plants.

I was involved in the discussion of the business arrangements; what the customer wanted and how we could provide that. I was responsible for negotiating the contracts from those agreements and administering the sales that occurred under those contracts.

* * * *

Q. When you refer to "Mobile" in your testimony, who are you referring to?

A. Mobile Oil Corporation and Mobile Natural Gas.

[II-24] Q. Okay. Because there are separate corporate entities involved here, for clarification, it would be good if you could refer to the specific corporation by the full name rather than just by "Mobile."

If there is some particular way that you want to refer to Mobile Natural Gas, Incorporated in a shortened form, that is fine, but it would help if you kept those companies separate as you testify.

I'm going to hand you two documents which have been marked previously as Appellant's Exhibit 9-A and Appellant's Exhibit 9-B.

I would like you to identify each of those documents separately, if you can, and explain what involvement, if any, you may have had with the negotiations and/or execution of those documents.

A. Exhibit 9-A is a gas purchase contract between Mobile Oil Corporation, Mobile Producing Texas and New Mexico, Incorporated, Mobile Oil Exploration and Producing Southeast, Incorporated, Mobile Exploration and Producing North American, Incorporated selling gas to General Motors. Exhibit 9-B is an amendment to the 9-A contract.

I was involved directly in the discussions with General Motors and the submission of a proposal for the business that's covered in these contracts. I was [II-25] directly involved in the negotiations of the contract terms and the administration of the sales that occurred under this contract.

Q. Would that include the sales that took place under the contract as amended as well?

A. Yes.

Q. I'm going to hand you four documents which have been marked previously as Appellant's Exhibit 10-A, 10-B, 10-C, and 10-D. Again, I would ask you to identify each of those documents separately and state what involvement, if any, you may have had in the negotiations and/or execution of those documents.

A. Exhibit 10-A is a natural gas contract for sales of gas from Mobile Natural Gas, Incorporated to General Motors. Exhibits 10-B, 10-C and 10-D are amendments to the Exhibit 10-A contract.

I was responsible for developing the business proposal that was submitted for this business and in negotiating the contract that

resulted and administering the sales of the gas that occurred under this contract, including it's amendments.

Q. Who signed the contracts on behalf of Mobile Natural Gas?

A. The contract, Exhibit 10-A, was signed by D. R. Briggs from Mobile.

[II-26] Q. Who signed the amendments?

A. I signed all three amendments; Exhibits 10-B, C and D.

* * * *

Q. Mr. Freeman, I'm going to hand you a document which has been marked previously as Appellant's Exhibit 15 till ask you to identify that document if you can and to state what involvement, if any, you may have had in the negotiations and/or execution of that document.

A. This is a natural gas contract between Mobile Natural Gas, Incorporated and General Motors. I was involved in developing the business proposal, in negotiating the contract and administering the sales that occurred under this contract.

Q. Finally, I'm going to hand you what has been marked previously as Appellant's Exhibit 12. I would [II-27] ask you to identify that document, if you can, and to state what involvement, if any, you may have had with the negotiations and/or execution of that document.

A. It's a natural gas contract for the sale of gas from Mobile Natural Gas, Incorporated to General Motors Corporation.

I was involved in developing the proposal for this sale, negotiating the contract and administering the sales which occurred under this contract.

Q. Mr. Freeman, under the terms of each of the contracts that you just identified, as you understand those terms, where did title to the natural gas sold to G.M. under those contracts actually pass or occur?

* * * *

THE WITNESS: Title to the natural gas from Mobile Natural Gas to G.M. — General Motors occurred at the delivery point into the initial receiving pipeline.

[II-28] BY MR. DUFFY:

Q. I am going to refer you back to Appellant's Exhibit 9-A, page 23 of that document; the article in the document headed Roman Numeral IX. What is your understanding of the terms "delivery point" or "point of delivery" as used in that article?

A. That is the point — the location of the delivery of natural gas into the initial receiving pipeline.

Q. And were any of the locations or the points of delivery in that contract located in Ohio?

A. No.

Q. Are they identified in the contracts?

A. Yes, they are identified fairly specifically in the various appendices.

Q. Okay. Would you state whether or not there would be additional points of delivery identified in any of the amendments to those contracts?

A. Additional — I'm sorry?

Q. Additional points of delivery in the amendments to the contracts; either that one or any of the ones you have identified.

A. There are deliver points specified in the exhibits.

Q. Would your answer regarding the term "point of delivery" as you understand it with regard to [II-29] Appellant's Exhibit 10 — Excuse me, Appellant's Exhibit 9 be the same for the other contracts you identified?

A. Yes.

Q. That did not change over the period?

A. No.

Q. How does the natural gas that was sold under these contracts that you just identified get transported or delivered to the point of delivery?

A. There are several different scenarios for that. In some instances the gas is delivered directly from the well or platform into the pipeline at the point of delivery.

Sometimes it's delivered at the tailgate of a processing plant where the producer will get the gas to that plant on his own and deliver the gas at the point of delivery at the manifold, at the tailgate of that plant.

There are instances where Mobile uses its own transportation in the production zone to move gas to the delivery point.

Q. Again, you have used the term "Mobile." Who are you referring to?

A. Mobile Natural Gas.

Q. During the audit period, would you state whether [II-30] Mobile Natural Gas, Incorporated or one of its affiliates ever transported gas sold under any of the contracts you have just identified from the point of delivery designated in that contract to any of the G.M. facilities in Ohio that I identified to you previously; that is the Lordstown plant, the Defiance Central Foundry plant or the Packard Electric Division facility in Warren?

A. Yes. Mobile has used its own transportation agreement on the initial receiving pipeline to deliver gas into Ohio to those plants.

* * * *

[II-34] * * * *

Q. Mr. Freeman, how often did Mobile Natural Gas deliver or transport gas to the General Motors facilities that I just identified during the audit period?

A. According to the records, for several months in 1988.

Q. Was it a regular occurrence under all of the contracts?

A. No. It occurred specifically under contract 9-A as amended.

Q. What amendment are you referring to?

A. Specifically the amendment is Exhibit 9-B.

MR. DUFFY: I have no further questions of the witness.

THE EXAMINER: Thank you, Mr. Duffy. Mr. Hubbard, you may proceed with your cross-examination.

MR. HUBBARD: Thank you, your Honor.

[II-35] CROSS-EXAMINATION

BY MR. HUBBARD:

Q. Are you initially from Pennsylvania?

A. Yes.

Q. So am I. I recognized your accent. You didn't have a southern accent. Do you work for Mobile Natural Gas, Inc.; is that your employer?

A. Yes.

Q. Okay. You are not employed then by Mobile, the parent corporation, Mobile Oil Corporation?

A. Not at this time.

Q. Okay. You were at one point, but then when Mobile Natural Gas, Inc. was incorporated, you then at that time became employed by Mobile Natural Gas, Inc.; is that right?

A. Yes.

Q. Does Mobile Natural Gas, Inc. own or control any facilities over which natural gas is delivered to Ohio consumers?

A. Mobile Natural Gas, Inc. itself owns no equipment, pipelines, et cetera. Could you explain what — give me a definition of "controlling," and I could better answer your question.

Q. By "control," I mean leases the equipment or [II-36] leases the pipelines, the facilities under which the transportation of the gas is performed.

A. Mobile Natural Gas has transportation agreements on pipelines which enable us to transport gas by making nominations for that transportation service.

To that extent, we exert some degree of control, of course, over those shipments in keeping with the pipeline transportation agreement.

However, we don't — I wouldn't call that leasing the facilities, nor do we have people who go out and control the pipelines by turning valves or setting instrumentation. We control our activities by making nominations.

Q. So Mobile Natural Gas, Inc. has no physical control over the facilities that are used to transport the gas; is that correct?

A. We don't turn valves or set instruments. We make a nomination over the transportation agreement.

Q. The entity with whom you're contracting with has that control, and it owns the facilities; is that correct?

A. Yes.

Q. What are those entities?

A. Various pipeline companies; ANR Pipeline, Panhandle Eastern, et cetera. There are 92 different [II-37] pipelines that we utilize to transport gas.

Q. Are those companies — are those pipeline companies regulated by federal and state regulatory authority, such as public utilities?

A. The interstate pipelines are regulated. I'm not a regulatory expert, so I am not qualified to make any further determination than that. There are intrastate pipelines, of course, that are not regulated by the government.

Q. And it would be your understanding that they may or may not be regulated by the state or locally?

A. That's right.

Q. Okay. With respect to Mobile Natural Gas and the affiliates that are referenced in these agreements, are any of those entities regulated by the federal government or by any local or state governmental unit as a public utility?

A. Not to my knowledge.

Q. Are you familiar the filings for taxation purposes of Mobile Natural Gas, Inc.?

A. I probably wouldn't have knowledge of our tax filings. That's not something that I deal with on a day-to-day basis.

Q. Do you know whether there would be any returns filed by Mobile Natural Gas in Ohio?

[II-38] A. No.

Q. Now, you made the statement that for a period of time in 1988 that Mobile Natural Gas provided for the delivery of gas to General Motors; is that correct?

A. Yes.

Q. Did Mobile Natural Gas, Inc. or its affiliate utilize any of their own facilities to transport that gas?

A. I can't answer that about Mobile affiliates. We do have natural gas pipelines, and of course, we own processing plants. One of the features of the —

Q. By "affiliates," I mean the affiliates referred to in the agreements.

A. Right.

Q. Okay.

A. Right. They own processing plants and physical hardware that gas could have passed through under these agreements.

Q. Okay.

A. One of the features of the direct-market business is to be non source specific which gives the supplier the flexibility of moving gas from his whole reserve portfolio to meet a customer's need, as opposed to specifying a well or lease, as sales in the traditional markets previous to the direct market were conducted.

[II-39] Q. Mobile Natural Gas, Inc. is a — would you characterize it as an independent marketer of natural gas?

A. I would classify us as a producer/marketer.

Q. Okay. But not necessarily independent because you have related entities; is that right?

A. Not independent because we are responsible for selling a significant portfolio of Mobile equity gas.

Q. Do you sell any gas other than gas that's produced by Mobile?

A. Yes.

Q. So in that sense, you should be independent?

A. Right. We like to think that we bring the best of a producer/marketer which is secured reserves and the benefit of an independent marketer who provides the services that the customers need, we can marry those two beneficial aspects together in Mobile Natural Gas.

Q. Now, Mobile Natural Gas, Inc. doesn't own any physical facilities over which gas is transported?

A. No.

Q. With respect to the statement that was made; that there was delivery of gas in Ohio in 1988 pursuant to the contract identified as 9-B the amendment —

A. Yes.

Q. — who actually performed the transportation of [II-40] that gas in Ohio?

A. Mobile Natural Gas, under its own transportation agreements, transported some of the gas that's covered in Exhibit 9-B.

Q. And whose facilities were used?

A. I believe it was Panhandle Eastern and Trunk Line Gas Company.

Q. So Panhandle Eastern and Trunk Line —

A. Trunk Line Gas Company.

Q. — actually performed the transportation; is that correct?

A. The gas was transported on those interstate pipelines. Right.

Q. And there are people who controlled — physically controlled that transportation of the gas, correct?

A. Well, we're back to that situation where they operate the pipeline.

Q. Right.

A. But we exert a degree of control by making a nomination under the terms of the transportation agreements and the transportation tariffs that permit us to be able to move gas on that pipeline.

Q. Okay. But they are operating the pipeline? "They" meaning the pipeline companies are operating that pipeline; is that correct?

[II-41] A. The pipeline companies are operating the pipelines. We have the opportunity to make a nomination to move gas and to change that nomination as our customers and Mobile Natural Gas sees fit.

Q. By nomination, you mean you designate how much gas you want delivered; is that correct?

A. Yes. Essentially that's right.

Q. So essentially, you're directing a pipeline company to deliver the gas on your behalf; is that correct?

A. Yes.

Q. Did the pipeline companies then deliver directly to General Motors, or do they deliver it to a local distribution company?

A. Could be either. Probably occurred both ways.

Q. You don't know, right?

A. Not without doing some research.

Q. Do you know what a local distribution company is?

A. Yes.

Q. Could you describe what that is?

A. It's a company which takes gas off of a major pipeline and steps down those volumes and delivers them to individual customers.

In the case of a local distribution company, you think of residential- and commercial-type customers [II-42] along with industrial customers.

Q. Is there a distribution company other than a local distribution company?

A. I wouldn't make a differentiation between a distribution and local distribution company.

Q. Same thing?

A. Same thing.

Q. Is the pressure of the gas at that point changed when it gets to the distribution level?

A. Yes.

Q. Now, with respect to the statement that in 1988 gas was delivered or transported pursuant to your transportation agreements by Mobile Natural Gas to Ohio to General Motors, are you making the statement that the gas at that point — the title to the gas was still in the name of Mobile Natural Gas, Inc.; is that the distinction that you're making?

A. What occurred was we delivered that gas into the initial receiving pipelines, and that is where title changed.

Q. And that would be outside the State of Ohio?

A. Yes.

Q. So that is true of all of these transactions?

A. Yes.

Q. Okay. So what made — Isn't it true with respect [II-43] to all of the gas that is sold by Mobile National Gas, Inc. and its affiliates to G.M.; that it's delivered by someone other than Mobile Natural Gas, Inc. to General Motors? That's true of all of the gas, isn't it?

A. Can you restate that for me, please.

Q. Okay. Isn't it true with respect to all the transactions between Mobile Natural Gas, Inc. and its affiliates and General Motors during the audit period, that all of the gas delivered in each instance was delivered by someone other than Mobile Natural Gas, Inc. or its affiliates?

* * * *

THE WITNESS: In Exhibit 9-B, we delivered gas to General Motors under our [II-44] transportation agreement.

BY MR. HUBBARD:

Q. Now, the transportation agreement that you had was these pipeline companies, Eastern and what was the other one?

A. Panhandle Eastern, Trunk Line Company.

Q. Panhandle Eastern and Trunk Line. They were the ones who actually delivered the gas, didn't they, to General Motors?

* * * *

THE WITNESS: We made a nomination to the pipeline under our transportation agreements, and that transportation agreement permits the gas to be [II-45] delivered in Ohio under Exhibit 9-B.

Q. Okay. So in that sense, and only in that sense are you saying you deliver it, because you're directing someone else to deliver it?

A. Correct.

Q. Now, with respect to — I think I figured out what the distinction is.

With respect to all of the other transactions, other than the ones in 1988 that you referred to, is it G.M. who contracts for the transportation of the gas from the initial receiving point?

A. Right. In most cases, and this is common in the industry, it's the customer who prefers to hold his own transportation down into the production zone. It's the gas marketing companies that aggregate that as gas in the production zone and delivering it to the customer's transportation.

However, as in Exhibit 9-B, if the customer needs or desires to have the gas delivered, we have that capability also. And we transport in the production zone to those initial receiving pipelines —

Q. Okay.

A. — quite a volume of gas.

Q. So the general role with respect to these [46] contracts is that General Motors contracted separately for the delivery of the gas from the initial receiving point outside Ohio to General Motors in Ohio?

A. Yes.

Q. But with respect to the transactions that were — that occurred pursuant to Exhibit 9-B, that wasn't the case; is that right?

* * * *

THE WITNESS: Under Exhibit 9-A and 9-B, both situations occurred. We delivered gas into initial receiving pipelines where General Motors held the transportation. And we also delivered gas into initial receiving pipelines where Mobile had the transportation.

Q. Thank you.

A. Mobile Natural Gas.

Q. All right. Okay. In your industry, do you refer to yourself as a marketer or broker of natural gas?

A. I would say we are a marketer of natural gas.

THE EXAMINER: Excuse me, Mr. Hubbard. When you say — refer to "yourself," are you referring Mobile Natural Gas?

MR. HUBBARD: Yes, I'm sorry.

[II-47] BY MR. HUBBARD:

Q. You meaning Mobile Natural Gas and you personally being an employee manager of Mobile Natural Gas, Inc., you refer to Mobile Mobile Natural Gas, Inc. as a marketer in your negotiations and discussions with clients?

A. I would classify Mobile Natural Gas as a natural gas marketing company.

Q. Are there several other natural gas marketing companies?

A. Yes.

* * * *

[II-49] * * * *

Q. Are you aware of other natural gas marketers who provide services similar to your company's?

A. There are other gas marketers in the business out there. I think McKenzie and Company did a study, and there are 300 natural gas marketing companies. McKenzie sees some of the major ones as Natural Gas Clearinghouse, Texaco, Shell.

Q. Are you aware of a company in Ohio called Access Energy?

A. Yes.

Q. Are they also in your business of marketing natural gas?

A. I believe they are owned by Enron.

Q. Is this the relatively recent industry that came about in the 1980's; this natural gas marketing industry?

A. Yes.

Q. And I believe you testified that Mobile got into this business in approximately mid 1986; is that correct?

A. Yes.

[II-50] Q. And they did it through their wholly-owned subsidiary, Mobile Natural Gas, Inc.?

A. The corporate entity, Mobile Natural Gas, Inc., was established in mid '87. Prior to '87, we operated as an affiliate of Mobile Oil Corporation.

MR. HUBBARD: I have no further questions of the witness at this time, your Honor.

THE EXAMINER: Thank you, Mr. Hubbard. Mr. Duffy, redirect?

MR. DUFFY: Just a minute.

(Discussion off the record.)

REDIRECT EXAMINATION

BY MR. DUFFY:

Q. Mr. Freeman, I think I have just three questions. You were asked by Mr. Hubbard whether you knew what a local distribution company was, and you explained that to him.

Taking that explanation that you gave him, did you have transportation agreements with local distribution companies during the audit periods?

When I say "you," Mobile Natural Gas, Inc.; whether you arranged or did your own transportation?

A. No. For sales to G.M.?

[II-51] Q. I am talking about to any customers.

A. Not to my knowledge.

Q. Okay. You made some reference or you made a response to Mr. Hubbard about regulating the pressure of natural gas; that that was something that the local distribution company did.

Might one of your end users or customers have their own pressure regulators at their facilities?

A. Yes.

Q. You have made references to situations during 1988 when you transported natural gas purchased by G.M. pursuant to the amendments to the contract that you have identified as Exhibit 9-B.

When you did that, did you charge General Motors separately for that transportation?

A. It was added to the price that we had previously negotiated under the base contract for the gas.

Q. Okay. So it wasn't something that you did for free under the terms of the original agreement?

A. No. The cost that we incurred in our transportation was added to the purchase price that was previously agreed to in the base contract.

MR. DUFFY: Okay. I have no other questions of the witness.

THE EXAMINER: Thank you, Mr. Duffy. [II-52] Mr. Hubbard.

MR. HUBBARD: None at this time, your Honor.

THE EXAMINER: Thank you, Mr. Freeman. You may step down. (Witness excused.)

* * * *

[II-57]* * * *

THE EXAMINER: Mr. Duffy, you may call your next witness.

* * * *

MR. DUFFY: I'd like to call Mr. Schuch to the stand. (Witness sworn.)

* * * *

[II-58] Jon Schuch

being first duly sworn, as prescribed by law, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DUFFY:

Q. Mr. Schuch, would you state your full name for the record, and would you spell your first name and your last name.

A. My full name is Jon J. Schuch. J-o-n, last name is S-c-h-u-c-h.

Q. Mr. Schuch, are you currently employed, and if so by whom?

A. I'm currently employed by General Motors, and specifically the Energy Supply Division of General Motors.

Q. What is your current business address?

A. Current business address is 485 West Milwaukee, that's Detroit, Michigan 48202.

Q. Mr. Schuch, how long have you been employed by General Motors Corporation?

A. Just a little bit over 25 years.

Q. What is your current position with General Motors, and how long have you held that position?

A. Currently I'm manager of transported gas. I have held that position since September '91.

[II-59] Q. What are your duties and responsibilities as manager of transported gas for General Motors?

A. I am in charge of purchasing natural gas and arranging for the transportation of that gas to our plant for about 130 plants nationwide.

Q. When was the Energy Supply Division of General Motors created, and what is its function or purpose within the corporation?

A. The Energy Supply Division was created back in 1974. Its initial function was to operate a gas field in northeast Ohio and supply gas to various plants in Ohio because of curtailments that we were having at that time.

In 1984, the Energy Supply Division expanded its activities into a gas marketing function. At that point in time, when the gas industry was deregulated, and we could purchase gas from suppliers and marketers, we began to do that. And since 1984, have expanded that activity to where we are now supplying about 130 plants.

Q. Mr. Schuch, what is your educational background?

A. I have a Bachelor's Degree in Economics from the University of Wisconsin, Madison. I have an M.B.A. from University of Dayton in Business Management.

Q. Do you hold any professional designations or [II-60] certificates?

A. I am a Registered Professional Engineer in the State of Ohio.

Q. Beginning with the date of your initial employment with General Motors, and coming forward to the present time, would you please state what positions you have held with the company; the period of time you held each such position, and the duties and responsibilities associated with each position?

A. I started with G.M. in 1968 with the Frigidaire Division. I worked for them for about seven years; held a position initially as a production foreman in charge of various assembly and machining operations.

I spent two years as as process engineer, and I was working on plant layout, projection and buying material-handling equipment; spent a couple of years as Director of Safety and Security, from '75 to '78, kind of changed names, the division subdivided.

I was working for Delco air-conditioning as an assistant superintendent and plant engineer. I was in charge of energy and environmental-type projects.

In '78 I transferred to Detroit, the corporate energy management section, worked there for four years as a staff project engineer. I was in charge of coordinating energy conversion projects for all of the [II-61] plants across the country.

I also spent a couple of years in the corporate energy management group working in the regulatory and legislative areas and expressed G.M.'s opinions to various governmental agencies and legislators as far as our position and the impact of regulation and pending legislation.

In '82, I transferred back to Ohio as Operations Manager for the Lordstown Gas Field. In that function, I was in charge of

basically production and transmission of gas here in Ohio. And then also as I mentioned previously, in '84, that position expanded to include gas marketing for all plants nationwide.

In September of '91, I transferred back to Detroit, the position that I have now, Manager of Transported Gas. And I also picked up some additional responsibility for electric wheeling, which is something that is just now coming to the forefront. I think that pretty well sums it up.

Q. Thank you. Mr. Schuch, one of the issues in these consolidated appeals involves an assessment of Ohio use tax and natural gas purchased by General Motors Corporation during the period from October 1, 1986 through December 31, 1990.

[II-62] The natural gas that was purchased was used at three facilities in Ohio; the Lordstown plant, Defiance Central Foundry plant, and the Packard Electric facilities in Warren, Ohio.

Are you personally familiar with any transactions during this time period involving the purchases of natural gas by G.M., and if so, would you explain how you happen to be familiar with those transactions?

A. Yeah, I am familiar with those transactions. I was personally responsible for negotiating the purchase contracts for the gas that was acquired and also negotiating transportation contracts where we transported gas from the point of delivery through interstate pipelines and local distribution companies to our plants.

Q. Mr. Schuch, I'm going to hand you two documents which we marked previously as Appellant's Exhibits 9-A and 9-B. I would like you, if you could, please, to identify each document separately and to explain what involvement, if any, you may have had with the negotiation and/or execution of those documents.

A. Okay. The 9-A document is a gas purchase contract, and 9-B is an amendment to that gas purchase contract.

I was responsible for negotiating the terms and [II-63] provisions of this contract and the amendment. That also involves

negotiating the contract terms, reviewing these contracts with our legal staff, getting their approval and preparing the documents for execution by duly authorized officers of General Motors.

Q. I'm going to hand you what have been marked previously as Appellant's Exhibits 10-A through 10-D. And again, I would ask you to identify, if you can, separately each of those documents and to explain what involvement, if any, you may have had in the negotiation or execution of those documents.

A. Again, what we have here is 10-A, a gas purchase contract. This involved delivery of gas into northeast Ohio. And we also have 10-B, an amendment to that purchase contract. And again, I had the responsibility for negotiating these contracts.

Q. How about 10-C and 10-D?

A. Exhibits 10-C and 10-D are also amendments to this gas purchase contract. I also negotiated those.

Q. I'm going to hand you what has been marked previously as Appellant's Exhibits 11 and 12 and ask if you would identify each of those documents separately, if you can, and to state what involvement, if any, you may have had in the negotiation or execution of those documents.

[II-64] A. These documents are both gas purchase agreements between General Motors and Mobile Natural Gas. One contract covers deliveries into the ANR pipeline, and the other contracts involve Texas — deliveries of gas into Texas Gas' transmission and Panhandle Eastern's pipelines. That's 11. And again, I was responsible for negotiating these on behalf of General Motors.

Q. I'm going to hand you two documents which have been marked previously as Appellant's Exhibit 13-A and 13-B and ask if you could identify those two documents separately, and to explain what involvement, if any, you may have had in the negotiation or execution of those documents.

A. Again, we have a gas purchase agreement. This is between General Motors and Yankee Resources, it's 13-A.

Exhibit 13-B is a document — it's an assignment of the contracts. And that was when Yankee Resources, I believe, became Access Energy. I was responsible for negotiating the agreements.

Q. I am going to hand you what has been marked previously, or what have been marked previously as Appellant's Exhibits 14-A through 14-D. Again, I would ask that you look at each of those documents, and if you can identify each of them separately and state what involvement, if any, you had in the negotiation or [II-65] execution of those documents.

A. Exhibit 14-A is a gas purchase agreement between General Motors and Rocky Mountain Energy. This was for delivery of gas including some plants in northeast Ohio. And then 14-B, C and D are amendments to that contract. Again, I was involved in negotiating the terms of these contracts and amendments.

Q. Okay. Finally I'm going to hand you what has been marked previously as Appellant's Exhibits 15-A through 15-H and ask you to identify each of those documents separately and to state what involvement, if any, you may have had in the negotiation or execution of those documents.

A. This was a contract — 15-A is a gas purchase contract between Wellhead Enterprises, Incorporated and General Motors. The rest of these documents 15-B through 15-H are amendments to that contract. This was a gas supplier to our Defiance plant. And again, I was responsible for negotiating these contracts and amendments.

Q. Does G.M. currently purchase any gas from either Wellhead Enterprises, Inc. or Rocky Mountain Energy Exchange?

* * * *

[II-66] * * * *

THE WITNESS: No, we don't. These two companies are no longer in business.

THE EXAMINER: Excuse me, Mr. Duffy. Before you proceed, with respect to Appellant's Exhibit 15-A, would you have the witness identify the date that the agreement became effective?

THE WITNESS: We don't have the specific date here. It was 1986. I would have to further peruse our files to get that date.

BY MR. DUFFY:

Q. Do you remember approximately when the agreement was executed?

A. Generally most of our contract purchase year starts on July 1 of each year and goes through June 30th of the following year. So I would say we are probably talking July '86 when this was executed.

Q. Do any of the amendments recite when the contract was originally executed?

A. Yes. Exhibit 15-B indicates it was July 24 of '86.

[II-67] THE EXAMINER: Thank you, Mr. Duffy. Please excuse my interruption.

MR. DUFFY: That's fine.

BY MR. DUFFY:

Q. Mr. Schuch, who at G.M. maintains control and custody of the original contracts that you just identified?

A. That falls under my responsibility. We keep those records in our Lordstown, Ohio office.

Q. How was the natural gas that was purchased during the audit period under the various contracts that you just identified here transported or delivered to the three G.M. facilities in Ohio where it was used during the audit period?

A. I guess we could kind of divide the Defiance plant on the northwest side of Ohio and the other two plants, Packard and Lordstown are northwest Ohio. So the gas into Defiance was transported — We had contracts with Panhandle Eastern Company

initially and we moved gas for several years on Panhandle. And then ANR Pipeline, which is American Natural Resources, built a five-mile extension into our — into the Defiance plant area. Then we switched pipelines and are still transporting on ANR. When ANR constructed their lines into the Defiance area, a local utility [II-68] company, Ohio Gas, agreed to transport directly into the plant.

MR. HUBBARD: Your Honor, is that the full name, Ohio Gas?

THE WITNESS: It's Ohio Gas Company. Then on the northeast deliveries into the Packard and B.O.C. Lordstown, the mode of transportation was we contracted with Texas Gas Transmission. They operate out of Texas and Louisiana. They redeliver to Consolidated Gas Corporation, which is an interstate pipeline that operates in the Appalachian basin. They also are the parent company of East Ohio Gas, and then would redeliver into East Ohio Gas. East Ohio Gas would then deliver to our plant location.

BY MR. DUFFY:

Q. Mr. Schuch, would you explain generally how G.M. accounts for the natural gas that is purchased under all of these contracts and actually bills the various plants for the gas — bills the plants for the gas used?

A. All the invoices from the various producers and marketers come into our Ohio office, and also all of the bills from all of the transporting parties; the [II-69] interstate pipelines, intrastate pipelines, local distribution companies also come in.

We verify the volumes, the rates and the price of the gas. I approve all of those invoices. We have a staff accounting group in Detroit that then takes all of the individual costs, adds them together and then we rebill the plants.

Q. When you say "we," are you talking about the Energy Supply Division?

A. It's actually staff accounting, centralized staff accounting group.

Q. But it's the company doing an intra-company billing?

A. Yes.

Q. I'm going to hand you the Statutory Transcript that is filed in case no. 92-510. I am going to ask you to look at, for example, page 185 of the transcript. If you would just explain what is contained on that page.

A. Okay. This is a bill from Mobile Natural Gas, Inc., one of our gas suppliers. This is just a listing of the volumes and the gas prices for a particular month.

Q. Okay. Does the bill continue over onto other pages?

[II-70] A. Looks here like we've got several pages involved with this.

Q. The bill itself does not consist of just one page?

A. Right.

Q. Would you state whether or not that invoice is representative of the type of invoices you would receive from Mobile Natural Gas?

A. Yes, they are. There are usually four or five pages to the typical Mobile invoice.

Q. And this would be for a specific time period?

A. Right, for usually a monthly bill.

Q. I am going to ask you to look at page 175 of the same transcript and ask if you could identify what is contained on that page?

A. Okay. That's an invoice from ANR Pipeline Company. That would be an invoice for transportation services. This happens to be the month of June 1989. It just lists various charges, a detail of what is included in the bill for that month.

Q. Would this be representative of one of the bills you would receive pursuant to one of the transportation agreements that you might have with one of those pipeline companies?

A. Yes, very typical.

[II-71] Q. I'm going to hand you again the same Statutory Transcript and ask you to look at page 179 of the transcript. Tell me what it is contained on that page.

A. Okay. This is a billing from the Ohio Gas Company in Bryan, Ohio. This is, again, an invoice for the transportation charges assessed for delivering the gas from the delivery point from the pipeline into our plant.

Q. Would that be typical of a bill that you would receive from Ohio Gas Company?

A. Yes.

Q. By "receive," would you say whether or not you would receive a similar type bill from East Ohio Gas Company?

A. Yes.

Q. And that would be for the delivery of gas to Lordstown and Warren?

A. Right.

Q. Finally, I am going to ask you to look, for example, at page 184 of the same transcript and ask if you would identify what is contained on that page.

A. This is an invoice that we generated internally from our staff accounting group. This is a billing that we sent over to central foundry. This is, as I mentioned before, the total volume for the month and [II-72] then the total of all of the charges added together, and they get their monthly bill.

Q. Would you state whether or not this would be typical of the kind of invoice that would be sent to any of the three facilities in Ohio?

A. Right. This is standard format.

Q. How many facilities did you say you purchased gas for?

A. Roughly about 130 plants.

Q. Would you state whether or not this type of billing would be typical for all these?

A. Right, same format.

* * * *

THE EXAMINER: Thank you, Mr. Duffy. Mr. Hubbard, cross-examination.

[II-73] CROSS-EXAMINATION

BY MR. HUBBARD:

Q. Is it Mr. Schuch?

A. Yes.

Q. It surprised me when you said you've worked for G.M. for 25 years because you certainly don't look old enough —

A. Thank you.

Q. — to have worked there for 25 years. I take it that right out of school you started working for G.M.?

A. Yes, sir.

Q. I believe you stated that starting in 1984 or thereabouts, gas marketing in Ohio was something that General Motors initiated at that point?

A. That's correct.

Q. And that you were — you headed that function in Ohio?

A. Right.

Q. Is that right?

A. Yes.

Q. Okay. What do you mean by "gas marketing"?

A. Arranging contracts for gas deliveries to our plants.

Q. Okay. Would that include situations where you're [II-74] dealing with local distribution companies and buying gas from them?

A. No. No. We basically shifted at that point in '84, shifted away from buying from utility companies and bought gas directly from producers and marketers.

Q. Do you still buy some gas from the local distribution companies?

A. Across the country, we have some tariff purchases, yes.

Q. In Ohio, do you? Or did you during the audit period?

MR. DUFFY: Are you talking about these three facilities or any facility in Ohio?

MR. HUBBARD: Well, these three facilities first, I guess.

THE WITNESS: There may have been a small percentage of gas. But 99 percent I would say would be bought by this other method.

BY MR. HUBBARD:

Q. Then with respect to your other plants in Ohio.

A. Yeah. That's what I mean, across Ohio.

Q. Across Ohio, including these three plants?

A. Yeah.

Q. Okay. The local distribution company is a company that both sells the gas and then deliveries the [II-75] gas to the end user, consumer; is that right?

A. That's not typically — they don't sell to General Motors.

Q. Okay.

A. They transport it.

Q. Okay. But local distribution — what is a local distribution company?

A. Well, a local distribution company, as far as an industrial end user, it's a company that transports gas from where it receives gas from interstate pipelines and redeliveries the gas to our plants.

Q. Okay. And is it typically the case, to your knowledge, that the local distribution companies also sell the gas?

A. For residential, commercial customers.

Q. Okay. For industrial customers, they are also engaged in providing purely transportation services; is that correct?

A. Right. We can buy gas from the distribution company, but it's basically not economical.

Q. Since 1984 when you instituted this gas marketing program, you hadn't done that prior to that time. Was that the primary way you purchased gas?

A. Yes, from either distribution companies or directly from pipelines. In Defiance, Ohio, there was [II-76] no distribution company historically.

Q. Okay. Now, East Ohio Gas, you identified, provided the last leg of the transportation of the gas?

A. That's correct.

Q. And they are a local distribution company, correct?

A. Yes.

Q. And something like that Ohio Gas Company, is that also a local distribution company?

A. Right.

Q. Okay. And then they are engaged in selling gas as well as transporting it?

A. I believe so.

Q. And by "they," I mean East Ohio Gas; is that correct?

A. Yeah.

Q. And you believe they —

A. Paid the bills.

Q. And Ohio Gas also?

A. Right.

Q. Are the companies that you identified in the contracts or that General Motors contracted with, and that you have identified as exhibits in this case, are all of those companies marketers of natural gas?

A. Marketers and/or producers of gas.

[II-77] Q. Okay.

A. Yeah.

Q. Are those entities — are any of those entities regulated as public utilities?

A. Not to my knowledge.

Q. What is the basic distinction between a pipeline company and a local distribution company?

A. We essentially, in our contracts, define — our definition of pipeline includes interstate and intrastate or local distribution companies. We basically define them as transporters of natural gas.

Q. Is it typically the situation, and I am referring to the audit period and the contracts that have been identified, that the agreement provided for General Motors to purchase the gas from

the marketer and then General Motors was to arrange for its transportation from the initial receiving point?

A. That's correct.

Q. Okay. And are there any exceptions to that, to your knowledge, with respect to the contracts that have been identified as exhibits?

A. There was one period of time where we utilized, I believe it was Mobile's — one of their transportation contracts.

Q. I'd like to refer your attention to page 182 of [II-78] the Statutory Transcript in B.T.A. Case No. 92-K-510. Do you have that handy?

A. No.

Q. I will give it to you. I note that this says "Summary of brokered gas used by Defiance plant, October 1, 1986 to June 30, 1990." Is that term "brokered gas" a term that you would use to describe the gas that's purchased from these, marketers under the agreements that have been identified as exhibits?

MR. DUFFY: I am going to ask that the witness first be asked if he can identify what the document is, if he has any familiarity with it.

MR. HUBBARD: Well, I will ask that question.

MR. DUFFY: You're asking him a question about what somebody else used in a document that maybe he didn't prepare.

MR. HUBBARD: I am asking him if that is a term that is used.

MR. DUFFY: I don't care as long as you're going to then establish that he has some familiarity with the document.

THE EXAMINER: Mr. Hubbard, if you simply wish to ask the witness what his opinion of the [II-79] term "brokered gas" constitutes, you may do so. If you wish to refer to a specific document, I would request that you ask the witness to identify or provide a foundation.

BY MR. HUBBARD:

Q. Do you recognize that term "brokered gas"?

MR. DUFFY: Not as used in the document.

MR. HUBBARD: It doesn't matter whether it's used in the document or not. I can reference something that's in a document, whether or not he knows that particular document. There is no rule of evidence that says I can't.

MR. DUFFY: I don't care as long as the record reflects that he is not testifying as to what the term "brokered gas" means in that document.

MR. HUBBARD: Certainly. That wasn't what the question was.

MR. DUFFY: Okay.

THE EXAMINER: Is the objection withdrawn?

MR. DUFFY: That's fine. As long as that is the understanding of everybody.

MR. HUBBARD: Okay.

THE WITNESS: We kind of use — [II-80] internally as far as what we do, marketing and brokering is kind of interchangeably.

BY MR. HUBBARD:

Q. Okay. So that is a term that is used by General Motors to describe these transactions?

A. Um-hum.

Q. Correct?

A. It's what we do as far as arranging for purchase and acquisition and transportation. It's an internal brokering or marketing function.

Q. Okay. And that term is used by General Motors internally?

A. Yes.

Q. Okay. Can you identify this document?

THE EXAMINER: You're referring to the Statutory Transcript?

MR. HUBBARD: Page 182.

THE EXAMINER: Thank you.

BY MR. HUBBARD:

Q. It may assist you in looking at this. You had earlier identified what page 184 was of that particular Statutory Transcript.

A. Well, this is a monthly summary of deliveries to the Defiance plant.

Q. Would that have been prepared by General Motors?

[II-81] A. I believe it was, yes.

* * * *

Q. Okay. And I believe it was your testimony on direct examination that determining the allocation of [II-82] the cost for each plant was something that staff accounting services of G.M. assisted in or primarily did?

A. That's correct.

Q. Is that correct?

A. Um-hum.

MR. HUBBARD: I have no further questions of the witness at this time.

THE EXAMINER: Thank you, Mr. Hubbard. Mr. Duffy, redirect..

REDIRECT EXAMINATION

BY MR. DUFFY:

Q. Mr. Schuch, in response to one of Mr. Hubbard's questions, you said your duties were to arrange for gas deliveries on behalf of General Motors Corporation. Would you state whether or not it's also true that you also arranged for gas purchases as well as gas deliveries?

A. That's correct.

MR. DUFFY: I have no further questions.

THE EXAMINER: Thank you, Mr. Duffy. Mr. Hubbard.

[II-83] MR. HUBBARD: No further questions, your Honor.

THE EXAMINER: Thank you, Mr. Schuch. You may step down. (Witness excused.)

THE EXAMINER: Mr. Duffy, you may call your next witness.

MR. DUFFY: I have no further witnesses to call at this time. I would move the admission of Appellant's Exhibits 9-A, through 15-H.

THE EXAMINER: Thank you, Mr. Duffy. For ease of reference, Mr. Hubbard, I will first refer to the documents to which the testimony was initially received from Mr. Freeman; those being Appellant's Exhibits 9-A through 12. Are there any objections to those documents being received into evidence?

MR. HUBBARD: No, your honor. I have no objections to any of those documents, 9-A through 15-H.

THE EXAMINER: All right. There is no need for me to further testify as to Appellant's Exhibits at this time other than to state for purposes of the record, Appellant's Exhibits 9-A through 15-H [II-84] will be received into evidence and considered by this Board.

Thereupon, Appellant's Exhibit Nos. 9-A through 15-H were received into evidence and made a part of the record herein.

MR. DUFFY: I have several other documents that I want to offer into evidence that are self-authenticating by certification of state officers.

THE EXAMINER: All right.

MR. DUFFY: I have marked a document as Appellant's 16, stated on its face to be a copy of an entry issued by the Public Utility Commission of Ohio under case no. 82-1435-GA-ARG styled "In the Matter of the Application of CNG Development Company for relief of the duty of Compliance with the obligation Imposed by Chapters 4901, 4903, 4905, 4907, 4909, 4921 and 4923 of the Revised Code."

It's certified by the Secretary of the Public Utilities Commission as being an authentic copy of their records.

* * * *

[II-85] * * * *

Thereupon, Appellant's Exhibit No. 16 was received into evidence and made a part of the record herein.

MR. DUFFY: I have marked as a [II-86] document Appellant's Exhibit 17. It is a certified copy of a foreign corporation application for license filed by Mobile Natural Gas, Inc. It is certified by the Ohio Secretary of State as being a true copy of the document on file in that official's office. I would move its admission into the record.

* * * *

[II-88] * * * *

Thereupon, Appellant's Exhibit No. 17 was received into evidence and made a part of the record herein.

MR. DUFFY: I have marked as a document Appellant's Exhibit No. 18 as a certificate from the Ohio Secretary of State's Office regarding Mobile Natural Gas, Inc. stating the date on which it qualified to do business in the State of Ohio, the license number assigned to it, and a statement that the corporation is currently in good standing on the records of that official's office as of May 13th, 1993.

* * * *

[II-90] Thereupon, Appellant's Exhibit No. 18 was received into evidence and made a part of the record herein.

MR. DUFFY: Appellant's Exhibit is a document again certified by the Ohio Secretary of State. It's an application filed with that official by Yankee Oil and Gas, Incorporated for a license to transact business as a foreign corporation in the State of Ohio pursuant to the provisions of the Ohio Revised Code stated in the application. I would move its admission into the record.

* * * *

THE EXAMINER: Appellant's Exhibit will be received into evidence.

Thereupon, Appellant's Exhibit No. 19 was received into evidence and made a part of the record herein.

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* * * *

[II-91] * * * *

MR. DUFFY: I have marked as a document Appellant's Exhibit 20. Again, this is a document certified by the Ohio Secretary of State as being a copy of an application for license on behalf of a foreign corporation filed by an entity known as the Yankee Gas Company. I move its admission into the record.

* * * *

[II-92] * * * *

THE EXAMINER: * * * I will overrule the objection with respect to Appellant Exhibits 20. It will be received into evidence.

[II-93] Thereupon, Appellant's Exhibit No. 20 was received into evidence and made a part of the record herein.

MR. DUFFY: I'm going to hand to you what has been marked as Appellant's Exhibit 21. It is a document certified by the Secretary of the State of Ohio, on file in that office. It is something prepared by the Secretary of State in the State of Delaware regarding a merger of the Yankee Companies, Inc. with the Yankee Gas Company, a Delaware Corporation. I would move its admission into evidence.

* * * *

Thereupon, Appellant's Exhibit No. 21 was received into evidence and made a part of the record herein.

MR. DUFFY: Exhibit 22 as marked [II-94] as a certified copy of the document from the Secretary of State's Office in Ohio relating to a statement of a merger in the Delaware Secretary of

State's Office with regard to the Yankee Gas Company and a merger with Yankee International Company and Yankee Resources, Inc., both corporations then organized and exist under the laws of Delaware, and Yankee Pipeline Company, a corporation existing under the laws of Texas. I would move its admission into evidence.

* * * *

Thereupon, Appellant's Exhibit No. 22 was received into evidence and made a part of the record herein.

MR. DUFFY: Appellant's Exhibit No. 23 is a document certified by the Ohio Secretary of State on file in that office. It is an amendment to the articles of Yankee Oil and Gas, Incorporated, changing its name to the Yankee Companies, Inc.

* * * *

[II-95] * * * *

Thereupon, Appellant's Exhibit No. 23 was received into evidence and made a part of the record herein.

MR. DUFFY: I have marked as Appellant's Exhibit 24 a certificate from the Ohio Secretary of State stating that he has reviewed the records of this company and that office and that there is no record of any such corporation known as Rocky Mountain Energy Exchange on file in that office or ever having been filed either as an Ohio corporation for profit or not-for-profit or a foreign corporation. I move its admission into evidence.

* * * *

[II-96] Thereupon, Appellant's Exhibit No. 24 was received into evidence and made a part of the record herein.

MR. DUFFY: Appellant's Exhibit 25 is a certificate identical to Appellant's Exhibit 24, only it relates to Wellhead Enterprises, Inc. I would move its admission into evidence as well.

* * * *

Thereupon, Appellant's Exhibit No. 25 was received into evidence and made a part of the record herein.

THE EXAMINER: Mr. Duffy, anything further on behalf of the Appellant at this time?

MR. DUFFY: No. The record does reflect that all of the exhibits have been moved and admitted into evidence. If that is true, I will rest.

THE EXAMINER: Based upon my review [II-97] of my notes with respect to the exhibits, it appears that all of the Appellant's exhibits have been received into evidence.

MR. DUFFY: Thank you.

THE EXAMINER: At this time, Mr. Hubbard, you may proceed on behalf of the Tax Commissioner.

* * * *

[II-98] * * * *

THE EXAMINER: We can go on the record.

Mr. Hubbard, you may proceed with your case in chief on behalf of the Tax Commissioner and call your first witness at this time.

MR. HUBBARD: Thank you, your Honor. I'd like to call Chris Whitaker to the stand.

(Witness sworn.)

THE EXAMINER: Mr. Hubbard, you may proceed.

[II-99] Christian A. Whitaker

being first duly sworn, as prescribed by law, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HUBBARD:

Q. Chris, could you state your full name for the record, please.

A. Christian A. Whitaker.

Q. And what is your work address?

A. My work address is 30 East Broad Street, State Office Tower, 21st floor.

Q. Who are you employed by?

A. I'm employed by the Ohio Department of Taxation, specifically the Division of Personal Property Taxes.

Q. How long have you been a Department of Taxation employee?

A. I have been an employee with the Department of Taxation since 1971.

Q. And what areas of the tax have you been involved in?

A. I have been involved with Ohio Revised Code 5711 dealing with personal property taxes. All of these years are in personal property taxes.

Q. Could you state what your current position is?

A. Currently I am section supervisor for central [II-100] audit of the 945 tax returns.

Q. And the 945, is that is a reference to the form number proscribed by the Tax Commissioner?

A. Yes, that's correct.

Q. What is a 945 form?

A. A Form 945 proscribed by the Tax Commissioner is a form to be filed by taxpayers holding business personal property in more than one Ohio county.

Q. And if they report property in a single county, what form do they use?

A. For business property in only one county, the proscribed form is form 920.

Q. Could you briefly describe for the Board your employment with the Department of Taxation's Personal Property Tax Section beginning from your earliest employment to the present, with approximate dates, if you can.

A. April 1971 I was employed as an agent to audit the Form 945. For two years I worked in that capacity. Then I was moved to audit review where I reviewed audits by agents from around the state. That is an audit of the Form 945, as well as the single-county Form 920.

From there I was moved to the Tax Commissioner's staff, and I coordinated the organization of a state [II-101] citation program out of each of the district offices. From there I moved to audit review for franchise tax, but that was brief, only three months.

Then I was moved again back to personal property taxes and worked in audit review, once again reviewing those personal property returns.

And then my current position as section supervisor over auditing for the State.

Q. Chris, in your day-to-day functions, do you have occasion to review personal property tax returns, Ohio personal property tax returns?

A. Oh, yes, daily. Because the agents and the supervisors under me bring returns to me with questions. We'll have some audit questions to discuss. There are many calls from tax reps and the local county auditors asking questions about returns that have been filed.

Q. Are original returns, the originals as opposed to copies of the returns, maintained at some of — are those returns maintained so that you would have access to them?

A. Yes. All of the Form 945 returns that are filed with the Tax Commissioner are maintained in a file room close to where I work. I have access to them daily.

Q. But they can be taken out by agents or by others [II-102] so they are not necessarily in the filing room, right?

A. That's correct.

Q. Okay. I am handing you what has been marked for identification as Appellee's Exhibits A and B. I'd like you to identify those documents if you can do that separately, identifying which is which.

MR. DUFFY: I'd like to hear some testimony on this witness first about Form 920s and other forms. We have heard about 945s, but the witness hasn't been handed a Form 945.

MR. HUBBARD: What he's been handed are — he can describe what those forms are.

BY MR. HUBBARD:

Q. Are you generally familiar with the forms of the Tax Commissioner — that have been proscribed by the Tax Commissioner for use by taxpayers?

A. If we are talking about Form 945, yes. I have audited the filing returns for years, and I work with them daily as well as the Form 920, single-county form.

Q. Okay. I am handing you what has been marked as Appellee's Exhibits A and B. Are they not Form 920s? Could you identify what they are?

A. Exhibit A is a Form 920-97 proscribed by the Tax Commissioner. It's tiled "Information Report of Personal Property Business Status."

[II-103] Q. Who is it for?

A. This form is for corporations licensed to do business in Ohio but who wish to declare they have no business personal property in Ohio, nor are they conducting business in Ohio.

Q. And with respect to Exhibit A, is this particular — what is the particular entity who filed this return?

A. Exhibit A is a form filed by Mobile Natural Gas, Inc. of Houston, Texas.

Q. Okay. And is there a declaration statement that's signed under the line that says "Signature of taxpayer"?

A. There is a signature under the declaration section dated April 27th, 1989.

Q. Okay. Could you for the record read the declaration that was immediately before that?

A. The declaration statement reads, "I/we declare under penalties of perjury that this return (including accompanying schedules and statements) has been examined by me/us, and to the best of my/our knowledge is a true, correct and complete return and report. This corporation is not engaged in business in Ohio and does not own property in Ohio."

Q. And then there is the signature line, and it says [II-104] "Signature of taxpayer," and there is a signature here; is that correct?

A. There is a signature under that declaration.

Q. Is that the original document maintained by the Ohio Department of Taxation?

A. Yes, this is the original form maintained by the department.

Q. And there is a back to the form; is there not?

A. The back of the form is an Ohio Balance Sheet.

Q. In this case was that filled out?

A. No, nothing's been filled out. It's blank.

Q. Now, I would like you to identify what's been marked as Appellee's Exhibit B.

A. Exhibit B is a tax Form 920 proscribed by the Tax Commissioner. That form is entitled "County Return of Taxable Business Property." It's from 1988. The taxpayer's name is filed in as Mobile National Gas, Inc. of Houston, Texas.

Q. Okay. And I believe you said it was for 1988. That's the 1988 tax year?

A. That's the 1988 tax year.

Q. Okay. And when would that return be due in calendar year 1988?

A. It would be due by April 30, 1988.

Q. And then there can be extensions of time granted [II-105] for that?

A. Correct.

Q. Is this the original document?

A. Yes. That's the original document filed.

Q. I'd like to refer your attention to the second page, not counting the back side of the first page as part of the first page.

A. The page you're referring to is Form 921, Ohio Balance Sheet, also for tax year 1988.

Q. And what does that say at the very top of that?

A. Above the name of the corporation, Mobile Natural Gas, Inc. Written in hand, "The company has no assets in Ohio." The balance sheet other than that is blank showing zero values (indicating).

Q. Okay. It is blank, right? That shows zero values; is that correct?

A. Yes. On the line "total assets," someone wrote zero for zero value.

Q. And again, is that return signed under the declaration, the signature line for signature of taxpayer?

A. Yes. On the face of the 920, under the declaration on the line for signature of taxpayer is a signature dated September 8th, 1988.

Q. Now, I refer your attention to the last two pages [II-106] of this particular exhibit. Could you identify what those documents are?

A. Page 3 of this document is a letter on company letterhead of Mobile Administrative Services Company, Inc. dated September 9th, 1988. It's a letter from this company addressed to tax agent William M. Meadows, Jr.

MR. DUFFY: Excuse me. What company are you referring to? I would like the record to reflect when he says it's a letter from this company, I want to know —

MR. HUBBARD: Mobile Administrative Services Company, Inc. is what he said.

BY MR. HUBBARD:

Q. And is it captioned "Mobile National Gas, Inc. 1988 Property Tax Return"?

A. This letter from Mobile Administrative Services, Inc. makes reference to Mobile Natural Gas, Inc.'s 1988 property tax return.

Q. Okay. And is it signed by William Fowler?

* * * *

[II-107] * * * *

BY MR. HUBBARD:

Q. Just to make this as quick as possible. Is it true that William Fowler signed the letter that's part of the exhibit and also signed the declaration on the first page of the exhibit?

A. Yes. Exhibit B front page, cover page of the 920? was signed by William Fowler, as well as on page 3 which is that letter from Mobile Administrative Services Company, Inc.

Q. Now, when you say it's from them, that's what the letterhead says?

A. Because of the letterhead.

[II-108] Q. The last page, is that a compliance letter that William Meadows, Tax Agent, sent to them — sent to Mobile Natural Gas, Inc.?

A. The last page of Exhibit B is a State of Ohio Department of Taxation letter mailed by William Meadows, Tax Agent to Mobile Natural Gas, Inc.

Q. And I'd like you to identify what is Appellee's Exhibit C.

A. Exhibit C is a printout from our Corporate Account Master Display. It's dated March 29th, 1993. It identifies Mobile Natural Gas, Inc. and gives a record of the filing history of the personal property tax returns.

Q. For what period of time does it give that history?

A. It gives a history for a period of ten years.

Q. Okay. And for the Board, could you state what the significance of the numbers '85, '86, '87, '88, '89 that went across the page refer to? What they mean?

A. The line you're referring to is a line identified as year. Years 1985, '86, '87 through 1994.

Q. Is that in reference to the —

A. That's in reference to the tax year. For the year 1988, we have a record that a return was filed declaring no business in no county in Ohio also for the [II-109] year.

Q. Okay. Let me ask you a question about that.

A. Okay.

Q. You make that statement. On what basis do you make that statement? Is there some code in there that indicates that? What is the code?

A. There is a number code 97. That code designates no county, no business.

Q. What do you mean by no — you mean they are filing a report for no property, for no county?

A. That's correct.

Q. Okay. And with reference to the 97 designation, is that also the designation that appears on Appellee's Exhibit 920-97?

A. Yes.

Q. And with respect to the 1989, rather 1990, 1991, 1992 tax year returns, is it also correct that the company filed or had no property in any county in Ohio based upon their filing?

A. That's correct.

Q. Do we have the returns for 1990, 1991, and 1992 form Mobile Natural Gas, Inc. now? Does the Department of Taxation have those?

A. We have those returns.

Q. You do have those returns?

[II-110] A. Excuse me. Let me correct that statement. We have had those returns. That's how we recorded that information on the Corporate Account Master Display. Since those returns were a characterization of no property, no business in Ohio, we maintain only two years. The earlier years were destroyed.

Q. The more current years were —

A. The more current years were also.

Q. I'm sorry. Okay. You said if the — We have the 1988 and 1989 tax years here.

A. I saved those.

Q. Okay. Now, with respect to the 1990, 1991 and 1992 tax years, those returns have been destroyed?

A. Those years were destroyed.

Q. Those tax returns?

A. Those tax returns that you're making reference to were destroyed.

Q. Okay. But the record here shows in fact that there were returns filed?

A. That's correct. They were filed.

THE EXAMINER:

Excuse me, Mr. Hubbard. "Here" refers to what document?

MR. HUBBARD: Appellee's Exhibit C.

Thank you, your Honor.

THE EXAMINER: Thank you.

[II-111] BY MR. HUBBARD:

Q. And that is the Corporate Account Master Display?

A. Yes.

Q. That's how it's identified at the top.

MR. HUBBARD:

I have no further questions of this witness.

THE EXAMINER:

Thank you, Mr. Hubbard.

Mr. Duffy, cross-examination.

CROSS-EXAMINATION

BY MR. DUFFY:

Q. Who saved the '88 and '89 returns from destruction?

A. The Form 97s that we are talking about, no county, no value returns, are stored in a storage area north of Columbus. The more recent years that were filed of that Form 97 were destroyed because there wasn't enough room to save them. The information from those documents had already been recorded, so our administrator decided to destroy those.

However, I was able to retrieve the older documents, '88 and '89 from the storage warehouse before they were destroyed.

Q. Has Mobile Natural Gas, Inc. represented to you [II-112] that it doesn't have any assets anywhere?

A. Could you repeat the question?

Q. Has Mobile Natural Gas, Inc. represented to the Ohio Department of Taxation that it has no assets anywhere?

A. By the letter filed by Mr. Fowler and by the forms filed, yes.

Q. Where did he say that in his letter?

A. I believe that's Exhibit B.

Q. Does he say they have no assets in Ohio?

MR. HUBBARD: He is asking in Ohio. Would you ask the question again, John.

MR. DUFFY: Why don't you sit down and let me cross-examine the witness.

BY MR. DUFFY:

Q. Did the company say to you that they had no assets anywhere, not just Ohio, but within or without Ohio?

A. No.

Q. They have just represented to you that they have no assets in Ohio; isn't that right?

A. That's correct.

Q. With regard to assets, they are talking about tangible personal property?

A. That's correct.

[II-113] Q. Are you aware of who the taxpayer is in this case you're testifying in?

A. No, I can't say that I am.

Q. Okay. Did the Commissioner designate you to come here today?

A. The Commissioner personally did not.

Q. Who did?

A. Bart Hubbard.

Q. I see. Is Mr. Hubbard employed by the Department of Taxation?

A. I will have to say no. I understand he is employed by the Attorney General.

Q. Who in the Commissioner's office authorized you to release Mobile Natural Gas, Inc.'s property tax returns?

A. My administrator and his assistant.

Q. Who is that?

A. The administrator is Robert Dudgeon, and his assistant is Ed Givens.

Q. Did they know that Mobile Natural Gas, Inc. wasn't a party to this appeal?

A. I don't know what they know.

Q. Do you routinely release information about other taxpayers to people in the Attorney General's Office?

A. No.

[II-114] Q. Do you release it — if I called you up and asked you for a copy of Mobile Natural Gas, Inc.'s return, would you have given them to me?

A. No, unless you can give me a letter signed by authority from that company that you are representing them.

Q. Did Mr. Hubbard give you a letter like that?

A. No.

Q. With regard to Exhibit C that you have identified, that is just a summary of information of what was filed with the Commissioner's office during a particular return year; isn't that correct?

A. During 10 return years, yes.

Q. Well, this form covers that period of time, but you are not purporting to say that Mobile Natural Gas, Inc., for example, was a corporation in 1985, are you?

A. No, I am not saying that.

Q. Okay. Why is the declaration on the Form 920-97, which is Exhibit A, that the company also is not engaged in business in Ohio? What does the taxpayer file if they are engaged in business but they don't own any property in Ohio?

A. If they are engaged in business in only one county they would file a Form 920. If in business in more than one county, the Form 945.

[II-115] Q. No. I said what if they are engaged —

MR. HUBBARD: He answered the question.

THE EXAMINER: Mr. Duffy, if you would like to restate your question.

MR. DUFFY: I don't think the witness understood me.

BY MR. DUFFY:

Q. I said what do they file if they are engaged in business in Ohio but own no tangible personal property anywhere in Ohio?

A. They should file a form with the Ohio Corporate Franchise Tax Division.

Q. What is that form?

A. Well, there are a couple of different forms. I'm not sure which one you're referring to.

Q. I am asking you what property tax return would you file when you are engaged in business in Ohio but you don't have any tangible personal property in Ohio?

A. The Form 920-97 I have in front of me.

Q. But what form do you file — what property tax form do you file if you are engaged in business in Ohio but you own no tangible personal property in Ohio?

A. I said you file the Form 920, and you can file the Form 920-97.

[II-116] Q. But the Form 920-97 contains a declaration that says you're both not engaged in business and you don't own any property in Ohio.

I am asking you what form is proscribed when you are engaged in business in Ohio, but you don't own any personal property in Ohio?

A. Form 920, as I said before, as well as Form 945. You can be in business in Ohio but have no personal property, and there is a declaration statement there.

Q. But what county do you file the return with then?

A. Whatever county it is you would be doing business in.

Q. You don't file a 945 with every county auditor that you are engage in business in, do you, Mr. Whitaker?

A. No. Nor did I say you do. You file the Form 945 with the Tax Commissioner.

Q. But you're saying that you have got to file, even though you own no taxable personal property in Ohio, you have to file a 920 with the county auditor for the county in which you're engaged in business?

A. If it is only one county, that's correct.

Q. What if it's more than one county?

A. Then it would be the Form 945.

Q. Why don't all taxpayers file their 945 with the [II-117] county auditor of every county in which they engage in business?

A. Because if they have business in just that one County, there is no need to have the Form 945 where you can list other costs if they are doing business in more than one county.

Q. You don't file a 945 based on where you're doing business. You only file a 945 based on where you have tangible personal property, don't you?

A. Right.

Q. Okay. Now, what if a taxpayer has no tangible personal property —

MR. HUBBARD: Your Honor, he's asked this several times. It's been answered several times.

MR. DUFFY: Is hasn't either.

THE EXAMINER: To the extent there is an objection, I will overrule it. However, I would encourage Mr. Duffy to phrase his question if it's unclear in a manner that the witness may be capable of understanding it.

BY MR. DUFFY:

Q. If a taxpayer has tangible personal property in Summit County, Cuyahoga County, and Hamilton County but has offices in those Lucas County and Columbiana [II-118] County, what county does he file a return with?

A. Every county that this corporation has tangible personal property in would be reported on the Form 945. That form would be filed with the Tax Commissioner. Does that answer the question?

Q. Okay. And it wouldn't be filed with any county auditor?

A. It would not be filed with any county auditor.

Q. Okay. And would it list all of the places where the person did business?

A. It would list all places where the taxpayer has tangible personal property.

Q. Right.

A. Right.

Q. Now, what if we have our taxpayer, and it engages in business in all five of those counties. It actually has a business

location, but owns no tangible personal property in any of those locations.

A. If the taxpayer — I have to make an example to see if I follow you. A salesperson who drove to another county to sell —

Q. I said they have an office in each of the five counties, but they don't own any tangible personal property themselves?

A. Which tells me they must be leasing or using [II-119] someone else's tangible personal property.

Q. Are you saying that you have to own or lease tangible personal property to engage in business in Ohio?

A. If on the tax returns that we have been discussing, the Form 920 and the Form 945, there is a place on that return for the business corporation to list property that's leased from others.

So if a business has an office in a county but owns no tangible personal property, they should list on that return who they are leasing that property from.

Q. But you're assuming that a company is leasing the property. What if they are not? What if they don't own or lease any tangible personal property?

MR. HUBBARD: What is the question?

BY MR. DUFFY:

Q. What return do they file?

A. Well, they still file the same returns we are talking about.

Q. In other words, in that situation the company files a 945 with the Tax Commissioner?

A. (Witness nodded.)

Q. And what business —

THE EXAMINER: Excuse me. For purposes of the record, Mr. Whitaker, if you could [II-120] indicate orally for the record either yes or no.

MR. HUBBARD: Instead of shaking your head, Chris, if you could just say yes, if it's yes.

BY MR. DUFFY:

Q. You didn't audibly answer my last question.

A. I wasn't aware that I answered the question. I'm sorry.

Q. You nodded your head, and the record will reflect that you nodded your head.

THE EXAMINER: Could you repeat Mr. Duffy's question prior to the last "yes." (Thereupon, the question was read.)

MR. DUFFY: Do you want an audible answer to the question?

THE EXAMINER: Please.

MR. DUFFY: Would you like the reporter to read back the last three questions. (Thereupon, the material was read.)

THE WITNESS: Yes.

BY MR. DUFFY:

Q. I said to you assuming they own or lease no tangible personal property, but they have a place of business in five different counties, you said they still file the 945 with the Commissioner. The question [II-121] I started to ask you then is what business location do they list in the return?

A. They list the location where they are using tangible personal property they own or they lease from another.

Q. My example was they own or lease no tangible personal property. Take that as a given.

A. They are still filing a return listing that they have business. If they have an office in, for example, Lorain County, they own no tangible personal property, they are not leasing the property, they will not be listing any property then. However, during the audit of that tax return, we'll be looking into that to find out if someone should be filing property for that county.

Q. That's all fine, but what business location do they list in the return, if they don't own it or lease any tangible personal property?

A. Are you telling me in your example that they own no property in Ohio in any county?

Q. Um-hum.

A. Nor are they leasing property in Ohio?

Q. That's right. That was my example.

A. Of course, they will still file the return, and they will give us this information.

[II-122] Q. What return will they file?

A. They could be filing either a 920-97, or they could be filing —

Q. Because the 920-97 requires they sign the declarations that they aren't engaged in business?

A. That's correct. But they are engaged in business so they will file a Form 920.

Q. With whom?

* * * *

[II-125] * * * *

THE EXAMINER: * * * Does there exist a form which a corporation could file that indicates that it is engaged in business in Ohio but does not own property in Ohio?

THE WITNESS: There is no special form for the purpose you mention concerning the personal property tax division, no.

THE EXAMINER: Thank you, Mr. Whitaker.

MR. HUBBARD: Your Honor, if I may, I have a clarificatory question. Are you meaning a special form?

THE EXAMINER: Is there a form stemming from 920 —

[II-126] MR. HUBBARD: I believe it's his testimony, as it has been, that you would file a Form 920 if you were doing business in a single county, Form 945 if you were doing business in more than one county.

THE EXAMINER: You may clarify my question on redirect.

MR. HUBBARD: Your Honor, are you asking are there specific forms or any form at all? He answered there is no specific form. Are you asking if there is a general form that could be filed, you know, a general form that can be filed, just so I am clear on your question.

THE EXAMINER: Mr. Whitaker, is there a form similar to 920-97 marked as Appellee's Exhibit A in which a corporation who is engaged in business in Ohio but does not own any property in Ohio can file to report its personal property business status within the state?

THE WITNESS: If a company is doing business in a county, but owns no personal property in that county, that company is to file a Form 920 with that county.

If the company is doing business in more than one county but owns no personal property in those counties, that company is to file Form 945 with the Tax [II-127] Commissioner.

THE EXAMINER: Mr. Duffy.

MR. DUFFY: Thank you.

BY MR. DUFFY:

Q. What does it list as the places of business in that form and where does it list it?

A. On the Form 945 under the cover there is a place to list location of business. On the Form 920, on the face of the 920 form, there is a place to list the place of business, the schedules underneath that which show a zero value.

Q. What schedule are you referring to?

A. The schedule I am referring to on the face of the Form 920 are schedule 2, schedule 3, schedule 3-A, and schedule 4.

Q. Now, Mr. Whitaker, aren't those places where you have property?

A. Or do not have property, whichever the case may be.

MR. HUBBARD: Your Honor, for clarification purposes, we are referring to Exhibit B, the first page.

BY MR. DUFFY:

Q. You're seriously telling me you that you expect somebody to list on schedules 2 and 3 and 4 all of the [II-128] places where they don't have machinery and equipment, furniture and fixtures and inventory?

A. Companies licensed to do business in Ohio are required to file with the Tax Commissioner or the Tax Commissioner's representative — for this purpose the local county auditors a return — so they can designate and declare whether they are holding taxable tangible personal property or not, as long as they do business in Ohio.

Q. Okay. I am going to hand you a copy of Section 711.02. Would you read the first sentence there to me, please.

A. 5711.02 Annual Returns, Supplying of Blanks. It reads, "Except as otherwise provided by Section 5711.13 of the Revised Code, each taxpayer shall make a return annually to the county auditor of each county in which any taxable property which the taxpayer must return is required by this Chapter to be listed and shall truly and correctly list therein all taxable property so required to be listed including property exempt under division (C)(3) of the Section 5709.01 of the Revised Code.

Q. Where does it say in there you file a return with the county auditor of the county where you are engaged in business?

[II-129] A. As you just stated to me, it doesn't. It isn't worded that way, no.

Q. I'm going to hand you Section 5711.13 of the Revised Code. What does the first sentence of that section say?

A. "A taxpayer having taxable property required to be listed in more than one county shall make a combined return to the Tax Commissioner listing all its taxable property in the state in conformity with Section 711.01 to 5711.36 of the Revised Code. A taxpayer shall make combined return assessment certifications to the treasure of state, a taxpayer having taxable property required to be listed in more than one county shall make a combined return to the Tax Commissioner listing all its taxable property in this state in conformity with Sections 5711.01 to 5711.36."

Q. Where does it say in there it has to also identify the places it is engaged in business?

A. In that paragraph, it doesn't say that.

Q. Where does it say it in Chapter 5711 that you have to identify the places in the State of Ohio where you're engaged in business?

A. I don't know of a place in 5711 where it states that.

Q. Okay.

[II-130] MR. HUBBARD: Your Honor, to the extent that this witness is testifying from his personal knowledge, I have no objection, but I would note that as a legal matter he is not an attorney and his functions aren't necessarily to have the Revised Code memorized or be able to cite its provisions or what authority there may be one way or the other on that.

THE EXAMINER: You made your notation for purposes of the record.

MR. DUFFY: Thank you. I'm sorry it took this long. I have no further questions of the witness.

THE EXAMINER: Thank you, Mr. Duffy. Mr. Hubbard, redirect.

MR. HUBBARD: No, your honor.

THE EXAMINER: Mr. Whitaker, you may step down. Thank you very much. (Witness excused.)

THE EXAMINER: Let's go off the record for just a moment.

(Luncheon recess taken.)

[II-131] Friday Afternoon Session May 14, 1993

THE EXAMINER: Back on the record. Mr. Hubbard, you may proceed with your case in chief. You may call your next witness.

MR. HUBBARD: We would call Steve Jaffee to the stand, please.

(Witness sworn.)

THE EXAMINER: Mr. Hubbard, you may proceed.

MR. DUFFY: Before we begin, I take it the additional people that are in the room are not going to testify in the proceeding here?

MR. HUBBARD: That's correct.

MR. DUFFY: Okay.

[II-132] Steve Jaffee

being duly sworn, as prescribed by law, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HUBBARD:

Q. Mr. Jaffee, could you state your name for the record and spell your last name, please.

A. My name is Steve Jaffee, J-a-f-f-e-e.

Q. Could you inform the Board briefly of what your educational background is?

A. I have a Bachelor of Arts in English from McGill University. I have a Master's in Business Administration from Northeastern University.

Q. Could you outline your employment history?

A. I began working in 1980 with Price Waterhouse in Boston, Massachusetts and worked there until March of 83 when I joined an entity called Yankee Resources, Inc. and moved out to Ohio with that same entity in 84 and have been with that entity or its successor entities since then.

Q. Is Access Energy the successor to Yankee Resources?

A. Yes.

Q. What are your duties currently for Access Energy?

A. As Executive Vice President of Access Energy, I [II-133] am currently responsible for the administrative services group which includes the operation management for purchases and sales of natural gas, including finance, accounting, human resources and information systems.

Q. How long have you been in that role?

A. I've been in that role or a similar role for about ten years.

Q. In your capacity in that role for Access Energy and prior to that Yankee Resources, and focusing on the audit period here, which is from roughly October 1986 through December of 1990, were you responsible for overseeing the tax reporting functions?

A. Yes.

Q. During that time, and specifically focusing on the period from October of '86 through 1990, did Yankee Resources file any public utility tax returns, be they public utility, property or gross receipts tax returns?

* * * *

[II-135] * * * *

THE WITNESS: No, they did not.

BY MR. HUBBARD:

Q. Were they required by the Department of Taxation Public Utility Division to do so?

* * * *

[II-136] * * * *

THE WITNESS: To my knowledge there was no requirement.

BY MR. HUBBARD:

Q. Did Yankee Resources and Access Energy file general purpose personal property tax returns as opposed to public utility property tax returns in Ohio?

* * * *

Q. And has that practice continued to the current time?

A. Yes, it has.

* * * *

[II-138] * * * *

BY MR. HUBBARD:

Q. Did Yankee Resources, now Access Energy file Ohio corporate franchise tax returns?

A. Yes.

Q. Could you describe the business of Yankee Resources, Inc. during the assessment period? And again the assessment period runs from roughly October of 1986 through 1990.

A. During that period, Yankee Resources was engaged in the business of natural gas marketing. In that effort, we would have arranged for the identification of natural gas supplies and for the transportation of those supplies to various customers who would typically be industrial end users.

Q. When was Yankee Resources formed?

A. Yankee Resources was formed in 1982.

Q. And when did Yankee Resources become Access Energy?

A. Access Energy was formed in 1988.

Q. When I refer to Yankee Resources or Access Energy, do you understand that I am referring to the same entity?

A. Yes, that's my assumption.

Q. I mean for purposes of these questions, if the [II-139] answer is different with respect to Yankee Resources as opposed to Access Energy, do you understand that you are to indicate the difference?

A. Yes.

Q. Now, you mentioned that Yankee Resources and Access Energy are marketers of natural gas. What does that entail? What does that involve?

A. Well, as an independent marketer, we are responsible for finding cost effective supplies for our customers. And in some cases, for arranging for the transportation of those supplies to the customer.

Q. What makes you independent?

A. Well, we aren't affiliated with any interstate pipelines or local distribution companies or producers. We are independent in that

sense. There are people that are engaged in the business of natural gas marketing who do have an affiliation.

Q. Did you have customers in Ohio during the audit period?

A. Yes.

Q. Just a round number of customers that you might have had then.

A. In Ohio, it would have been roughly between 80 and 90 customers.

Q. And what type of companies would be customers?

[II-140] A. Steel manufacturers, car manufacturers, people that are using natural gas in some sort of manufacturing process.

Q. There's been some reference in the hearing to Yankee Gas Company as opposed to Yankee Resources or Access. What is the relationship of Yankee Gas to Yankee Resources?

A. In 1958, our parent company, The Yankee Companies, formed Yankee Gas as an intermediate holding company. The Yankee Gas Company had three wholly-owned subsidiaries; one of those was Yankee Resources.

Q. Could you describe the circumstances and changes in the natural gas industry that led to the creation of private gas marketing companies such as Access Energy and Yankee Resources?

A. There was a period in the late '70's and early '85's where there were curtailments on supplies and shortages of natural gas. And Ohio was one of the first areas where programs were established whereby industrial end users who couldn't buy enough natural gas were able to arrange with producers to buy supplies and have them delivered to their facilities. It was called the Self-Help Program.

And as a result of that beginning effort, an industry was formed because it was possible to arrange [141] for the purchase

of those supplies at prices that were lower than those being offered by local distribution companies.

Q. Has this way of selling gas become more popular as time has gone on?

A. I think the amount of gas that's transported by independent means or by people like Access Energy has grown from a very small percentage in 1982 to probably 80 or 90 percent of the gas that's consumed by industrial users.

Q. How many companies were engaged in marketing gas like Access Energy does?

A. I am not sure of the exact number, but there are directories that have at least 200 to 300 companies listed.

* * * *

[II-142] * * * *

Q. Do you have information other than the directories that you're testifying to in estimating the amount?

A. I have knowledge that there are hundreds of companies engaged in the purchase and sale of natural gas.

Q. And is that just from your general experience in the industry?

A. Yes.

Q. Access Energy, and before that Yankee Resources, were they relatively new in this market or are they one of the more established companies?

MR. DUFFY: Objection, leading.

[II-143] MR. HUBBARD: I am trying to make it not leading, but that doesn't suggest the answer.

MR. DUFFY: You want him to give you one or the other answers.

MR. HUBBARD: Or something in between.

THE EXAMINER: Why don't you attempt to rephrase your question.

BY MR. HUBBARD:

Q. * * * The industry you have testified came into being essentially in 1980; is that correct?

A. Very early 1980, yes.

Q. And Access Energy started, or then known as Yankee Resources, was formed when?

A. In 1982. Access Energy is one of the oldest, if not the oldest independent natural gas marketer.

Q. Who does Access provide its services to?

A. Access provides services to selected industrial users of natural gas. And in some cases, sells natural gas to local distribution companies.

Q. Does Access provide natural — sell natural gas to customers outside Ohio as well as in Ohio?

A. Yes, it does.

Q. How many customers does Access have nationally?

[II-144] A. Access has approximately 500 industrial customers throughout 34 states in the U.S.

Q. How does natural gas get delivered to the customers, the end user customers?

A. Natural gas is typically purchased into a receipt point at a receiving pipeline, and that pipeline would then transport the gas to a local distribution company who would then redeliver that gas to the industrial end user.

Q. Does Access produce its own gas?

A. No, it does not.

Q. So it does purchase gas from producers?

A. Access purchases gas from many different producers.

Q. Does Access own or control any assets which are used for the distribution of natural gas to consumers?

A. No, it does not.

Q. Does Access own or control any physical assets over which the gas is transported or delivered to consumers?

A. No.

Q. Are you aware that natural gas companies are subject to regulations as public utilities in Ohio?

A. Yes.

Q. Is Access Energy, prior to that Yankee Resources, [II-145] Inc., subject to regulations by the Public Utilities Commission in Ohio?

* * * *

THE WITNESS: To my knowledge, Access Energy and Yankee Resources are or were not subject to regulations.

BY MR. HUBBARD:

Q. Have they ever been subject to regulation by the PUCO?

A. Not to my knowledge.

* * * *

[II-146] * * * *

Thereupon, Appellee's Exhibits D and E were marked for purposes of identification.

THE EXAMINER: Back on the record.

BY MR. HUBBARD:

Q. I will hand you what's been marked as Appellee's Exhibit D. The first page is a copy of a certification. I'd like you to identify what the rest of the document is, if you can.

A. This document represents a request made by counsel for Yankee Resources for an application for relief from jurisdiction to specify that Access is not a public utility pursuant to the appropriate sections.

Q. And I am handing you what's been marked as Appellee's Exhibit E, the first page of which is a copy of the certification statement from the Public Utilities Commission. Could you identify the remainder of that document?

A. This document is an order by the Public Utilities Commission of Ohio stating that the Commission's opinion is —

* * * *

[II-149] * * * *

THE EXAMINER: If the witness can testify to that effect, I will let it in. If he can identify it from his knowledge.

BY MR. HUBBARD:

Q. Mr. Jaffee, were you identifying these documents — Are you personally familiar with these documents?

A. Yes, I am.

Q. And how did you gain that familiarity with these documents?

A. From being involved in the process of asking for them to be prepared, and then having knowledge that they had been received by the company.

Q. In fact, are you very much aware of these documents, and are these documents relied upon you by, Access Energy, today?

A. Yes.

* * * *

[II-150] * * * *

Q. Referring to Exhibit E, is there an ordering paragraph to that document?

A. Yes.

Q. And is that paragraph 7?

A. Yes, it is.

Q. Now, have you reviewed both Appellee's D and E?

A. Yes, I have.

Q. Are those statements about Yankee Resources' operations true of Access Energy today, and were they true of Yankee Resources and Access Energy during the audit period involved here?

A. Yes.

Q. Okay. Exhibit D is the application that was made to the Public utilities Commission of Ohio by Yankee Resources, Inc., correct?

A. Yes, it is.

Q. And Exhibit E is the entry to the PUCO that was the result of that application; is that right?

A. Yes, it is.

Q. Is that the entry to the PUCO that we have identified as Exhibit E still in force and effect with respect to Access Energy today?

* * * *

[II-151] * * * *

THE WITNESS: It's my understanding that this document is, in fact, and I know of no event or transaction that's transpired since it was issued that would cause it not to be intact.

Q. In other words, the facts that are recited in the order which form the Public Utilities Commission's basis for determining that Yankee Resources and now Access Energy are not natural gas

companies for PUCO purposes is still the same, the factual basis is still the same?

A. Yes.

Q. Have you ever been advised by the PUCO, by "you," I mean Access Energy or Yankee Resources, that the order is not in effect?

[II-152] A. No, we have not.

Q. How does Access determine who it will provide services to?

A. Access routinely identifies industrial end users that are located in areas which it deems it can serve on an economically attractive basis and then selectively contacts those customers and seeks to arrange for the purchase and sale of natural gas for that customer.

Q. Does Access Energy, and previous to that Yankee Resources, own any of its own transmission or distribution facilities to transport the gas in Ohio?

A. No.

Q. All the gas that you sell then moves through the transportation facilities owned by pipeline companies and public utilities?

A. Yes.

Q. Do you choose your customers?

A. Well, we identify people that we believe we can economically serve. We aren't always able to reach agreement on terms and conditions.

Q. But you do not hold yourself out to the general public?

A. No, we do not.

Q. You negotiate contracts separately for each [II-153] customer?

A. Yes. The terms and conditions are negotiated on a case-by-case basis.

Q. Can any consumer of natural gas require Access to enter into a contract with that particular individual or consumer?

A. No.

Q. Is Access required to offer its service to any particular — or I'm sorry, to a general or indefinite public?

A. No, it is not.

Q. Does Access in any way hold itself out as providing services to a general or indefinite public?

A. No, it does not.

Q. Is Access owned by, affiliated with or under the control of a regulated public utility?

A. No, it is not.

Q. Is Access owned by a person or company which makes its services available generally and indiscriminately to the public?

A. No.

Q. Is Access granted any rights or franchise by state, city or local government units to operate its business?

A. No.

[II-154] Q. Is the price charged by Access for its services fixed or controlled by any governmental units?

A. No, they are not.

Q. Is Access licensed by any governmental unit in the areas within which Access can operate?

A. No.

Q. Must Access pay any fees to any governmental unit to provide services to its customers?

A. Could you repeat that question, please.

Q. Sure. Must Access pay any fees to any governmental unit to provide services to its customers?

A. No.

Q. Can access or its customers terminate contracts without prior approval of any governmental unit?

A. Yes.

Q. Does any governmental unit restrict the territory in which Access operates?

A. No.

Q. Can Access use the power of eminent domain over any property?

A. No, it cannot.

Q. Has Access been granted any special rights to request the State of Ohio or any other governmental unit to exercise police power to aid Access in the operation of its business?

[II-155] A. No.

Q. The questions I have asked you with respect to Access, was that also true of Yankee Resources?

A. Yes, it is.

Q. Is Access required to pay a fee to the PUCO to cover the PUCO's expenses?

A. No.

Q. Is Access required to file reports with the PUCO under Section 905.14 of the Revised Code in the annual report?

A. No.

Q. Is it required to subject its system of accounts to those provided by the PUCO?

A. No.

* * * *

[II-156] * * * *

Q. Is Access required\to keep the depreciation accounts pursuant to Section 905.18 of the Revised Code?

A. No.

Q. Is it required to final tariffs pursuant to Revised Code Section 905.19?

A. No.

Q. Is it required to file rates that are then subject to approval of the Public Utilities Commission of Ohio?

A. No.

Q. Is it required, pursuant to Revised Code Section 905.20 and .21 to file an application to abandon services and facilities when it does, in fact, abandon facilities?

A. We don't own any facilities.

Q. Is Access required to file any purchase gas adjustment clause pursuant to Section 904.30(2) of the Revised Code?

A. No.

MR. HUBBARD: I have no further questions of the witness at this time, your Honor.

THE EXAMINER: Mr. Duffy, [II-157] cross-examination.

CROSS-EXAMINATION

BY MR. DUFFY:

Q. Mr. Jaffee, you said that Access Energy, Inc. is a successor to Yankee Resources, Inc.; is that correct?

A. Access is a successor.

Q. Could you explain to me how they became a successor corporation?

A. In 1988, the management of Yankee Resources, Inc. formed Access Energy Corporation along with another entity called Yankee Gas Acquisition and essentially purchased the assets of Yankee Resources, Inc. and substantially all of the liabilities.

Q. Who did; the acquisition company or Yankee or Access Energy Corporation?

A. The acquisition company actually purchased the assets, and it was renamed Access Energy Corporation.

Q. What happened back in 1982 that allowed your company, and by that I am referring either to Yankee Resources, Inc. or Access Energy Corporation, what happened back in 1982 that allowed your company to get into the marketing of natural gas to end users?

A. It was a supply and demand imbalance which existed and caused shortages. As a result, it became [II-158] attractive for industrial users who wanted to secure supplies to go directly to a third party to supply those, to receive those supplies.

As a result the regulations, the interstate pipelines and local distribution companies began to shift over time allowing for third-party transportation. And it was that allowance of third-party transportation that allowed Yankee Resources and Access Energy to do what they do.

Q. So it's true you couldn't have gotten into the business without the changes in the regulatory environment regarding the transportation of gas to end users, right?

A. That's true.

Q. You indicated that prior to that change that end users had to buy their gas from local distribution companies. It is true that end users could also buy gas from pipeline companies during that time, couldn't they?

A. I don't think that was true in all of the — in very many cases. I believe the — I know that there are instances where certain industrial users had direct connections with interstate pipelines, but that's the exception as opposed to the rule.

Q. But they were permitted to do it if they wanted [II-159] to?

A. They were permitted to do it if they were connected, not if they wanted to. They had to be directly connected to a pipeline where there was no longer a distribution company to provide service.

Q. You characterized Yankee Resources and Access Energy as an independent marketer, you said because they weren't affiliated with any other companies essentially who produce gas or sold it. Are there companies that are engaged in the same business that you are that aren't independent in the way that you just described it?

A. Yes.

Q. Could you name some?

A. As an example, Tenn Gas Co., which is a gas marketing company that is not independent because they are affiliated with Tennessee.

Q. How about Mobile Natural Gas Company, Mobile Natural Gas, Inc.?

A. I would describe Mobile as affiliated with Mobile Oil, a major producer.

Q. So it's not an independent marketer then?

A. I would not characterize it as an independent marketer.

Q. During your testimony, you talked about providing [II-160] service to end users. When you were talking about your customers, you referred to your local distribution customers, you talked about making sales to them. What is the difference?

A. I'm not sure I understand the question.

MR. HUBBARD: Your Honor, could we have that question repeated, please.

THE EXAMINER: Please repeat the question.

BY MR. DUFFY:

Q. You characterized what you were doing for your customers as the provision of services. You were talking about selling gas to end users, industrial customers or end users, but maybe I misunderstood you. I thought you also said that you sold natural gas to local distribution companies as well?

A. We did sell some gas to local distribution companies.

Q. And you characterized that as sales, not as services. What is the difference?

A. I guess my definition of what we do is, and I didn't mean to use a strict definition, but whether we are selling gas to a local distribution company or industrial end users, we are selling gas and providing a service to them.

[II-161] Q. Okay. So the nature of your business in terms of whether a customer is a local distribution company or an industrial end user, what you do for both of them is essentially the same —

A. Yes.

Q. — as a customer?

A. We arrange for the purchase and sale.

Q. Is it correct that you own no, what you characterize as transportation or distribution facilities anywhere either in Ohio or outside of Ohio, because you were very careful to say you didn't have any in Ohio?

A. Well, let me make sure I understand what type of facility you're referring to because there were — during the audit period, we did own some assets. I would not characterize those assets as

distribution facilities or as transmission facilities, but rather gathering facilities.

Q. What is a gathering facility?

A. A gathering facility is a very small diameter pipeline that would connect to various wellheads and gather gas for the ultimate delivery to an interstate pipeline.

Q. Does one of your lines actually feed into the interstate pipeline?

[II-162] MR. HUBBARD: Objection as to the time period of the question. Are you asking — is that a question intended for currently, presently?

MR. DUFFY: I said during the audit period.

MR. HUBBARD: He said "does." Are you asking presently or during the audit period?

MR. DUFFY: I was cross-examining him about a statement that he made in response to one of your questions. He was very careful to say that, during the audit period, they owned no transportation or distribution facility in Ohio.

I was trying to find out whether he was making a distinction between in Ohio and outside of Ohio facilities. When he answered that question, he proceeded to say that — tell me what kind of pipes they have to move gas. My questions was is that connected directly to an interstate pipeline.

MR. HUBBARD: Is it or was it during the audit period or some portion of the audit period?

MR. DUFFY: Well, is it or was it when they had it.

MR. HUBBARD: All right. I was just asking for a clarification as to what you're [II-163] asking.

MR. DUFFY: It's the witness I am asking the question to, not you. I wish that you would let him answer the question.

MR. HUBBARD: The question was ambiguous as you phrased it. We were talking about the audit period and then you switched to the current tense.

MR. DUFFY: You cannot say that. The witness can say that if he doesn't understand the, question, but you can't.

MR. HUBBARD: I felt that it was an ambiguous question based on a sequence of questions. I object to it on that basis.

THE EXAMINER: Mr. Duffy, if you can indicate to the witness, if the witness is unclear as to the period which you're referring, I would request that you do so. If the witness understands the period to which your referring, he may so testify.

BY MR. DUFFY:

Q. When did you own these facilities that you are now talking about, Mr. Jaffee?

A. The facilities to which I referred would have been owned between 1985 and 1988.

Q. Did you misunderstand my last question?

[II-164] A. I assumed that you were referring to the audit period.

Q. I am talking about now my last question. Were these facilities connected to an interstate pipeline? If you want to distinguish whether they were or were not during portions of the audit period, that's fine. But I am asking you that during the entire period that you owned them.

A. During the entire period, they were not connected to interstate pipelines.

Q. What are they connected to?

A. They were connected to intrastate pipelines in Texas and Oklahoma.

Q. Who owned those pipelines?

A. The intrastate pipelines?

Q. Yes.

A. As an example, Houston Pipeline, Houston Natural Gas.

Q. Was this gas that you produced?

A. No.

Q. Who did?

A. Various producers.

Q. And then you just owned the facility to separate it and to gather it and dump it into an intrastate pipeline?

[II-165] A. I'm not sure about any separation, but for purposes of gathering, yes.

MR. HUBBARD: Objection. Was that an interstate pipeline or intra?

MR. DUFFY: Intra.

MR. HUBBARD: Intra.

MR. DUFFY: Yes.

THE EXAMINER: Objection withdrawn?

MR. HUBBARD: Yeah. If in fact it's clear in the record it was "intrastate."

THE EXAMINER: That's what I heard.

MR. HUBBARD: Okay.

BY MR. DUFFY:

Q. Are you saying then that your gas gathering line really consisted of a network of pipes that gathered natural gas from a battery of separators owned by independent producers? Is that what you're describing down in Texas?

A. I am saying that we owned some gathering lines. I'm not sure whether there was any separation on those lines. But we

gathered gas from various producers and delivered that gas into intrastate pipelines.

Q. I know that one terminus of your gathering line was the intrastate pipeline. Where is the beginning point of your line?

[II-166] A. The beginning point might have been at the wellhead, might have been a little bit beyond. I'm not sure.

Q. It would hook up then to some piece of pipeline belonging to another producer?

A. Yes.

Q. Or a producer, not another producer?

A. Yes.

Q. During the audit period did you sell any natural gas to General Motors in the State of Ohio?

A. When you say "sell," I want to make sure I understand whether you're talking about technical sale at the point of delivery prior to where title was transferred, or did we sell gas to a facility in Ohio.

Q. Let me ask you this. Did you report your G.M. sales as Ohio sales for franchise tax purposes?

A. I'm not sure. I'd have to look.

Q. Do you want to do that?

A. I wouldn't be able to answer you right now.

Q. Do you have the returns here today that you referenced that you filed?

A. They are not with me.

Q. Wouldn't they be the best evidence of whether you filed returns in Ohio or not?

A. They would.

[II-167] Q. Did you personally file them with the state?

A. No.

Q. Who did?

A. They would have been filed by our auditors. During the audit period that would have been Arthur Young up until 1988, and then Peat Marwick thereafter.

Q. Did you ever see them?

A. Yes.

Q. Did you sign them?

A. I signed some of them. I'm not sure if I signed all of them.

Q. You have been talking about your selling gas here during a lot of your testimony, and now you're asking me whether I am using "selling" or "sale" in the technical sense. What sense were you using it during your testimony?

A. As part of the provision of service to our customers.

Q. Well, did you arrange for the transportation of the natural gas that you sell?

A. In some cases we do.

Q. That's part of your overall services?

A. It can be, yes.

Q. Did you do that for General Motors Corporation?

A. We did not do that for General Motors.

[II-168] Q. So when did your service for them end with regard to the sale of natural gas?

A. It would have ended when we delivered the gas into a receiving pipeline.

Q. And did you do that in Ohio?

A. No.

Q. So when I ask you if you sold any natural gas to General Motors in Ohio during the audit period, how would you answer that question in the context of your testimony here today?

A. I would answer no.

MR. HUBBARD: Your Honor, I believe it's clear he is responding in the sense where title passes.

MR. DUFFY: I don't think that requires — I do not think that it requires a comment from you, Bart. You can ask him questions.

MR. HUBBARD: The thing is you self-define these questions, and then three or four questions later, as you define the term, he answers it.

I want it clear in the record as to what he is talking about.

MR. DUFFY: I didn't either. I asked him to define the term.

MR. HUBBARD: And he asked you.

[II-169] THE EXAMINER: It appears to me to be the purpose of cross-examination to clarify on redirect.

MR. HUBBARD: Fine.

BY MR. DUFFY:

Q. Mr. Jaffee, did you have to go into the Public Utilities Commission and request any kind of a ruling from the Commission in order to sell gas to General Motors down in Texas?

A. No.

Q. Mr. Jaffee, I'm going to hand you a document which was marked previously in this case as Appellant's Exhibit-A and ask you if you have ever seen that document before?

A. Yes, I have.

Q. What is your understanding of what that document is?

A. This is a contract which — gas purchase agreement which governs the purchase and sale of natural gas by and between Yankee Resources and General Motors Corporation.

Q. What were the points of delivery for the natural gas sold to General Motors under that agreement?

A. The points of delivery are the initial receiving pipeline of Texas Gas Transmission.

[II-170] Q. Is that the only place?

A. There are several Texas Gas Transmission Corporation receipt points.

Q. Where were they located?

A. One is located in Louisiana; Florida. Four of them were in Louisiana.

Q. Has your company filed tax returns in Louisiana?

A. I believe we do.

Q. What kind of returns do you file down there?

A. I believe we file sales tax returns in Louisiana.

Q. What other types of returns?

A. I'm not sure if there are any. I'd have to review our — we file returns in a lot of different states. We do business in 34 states. Some require filing of returns, some don't.

Q. What about in Texas?

A. I'm not sure of the Texas requirements without looking.

Q. Why don't you charge General Motors Corporation sales tax on the gas that was delivered to them in Louisiana?

A. I don't know. I'm not 100 percent sure.

MR. DUFFY: I don't have any further questions of the witness.

THE EXAMINER: Mr. Hubbard, [II-171] redirect.

REDIRECT EXAMINATION

BY MR. HUBBARD:

Q. Mr. Jaffee, does Access Energy, and before that Yankee Resources, sell gas to its customers where title to the gas passes in Ohio? Passes from Yankee Resources or Access Energy to the customers in Ohio?

A. Yes.

Q. That was true during the audit period?

A. Yes.

Q. To put that more concretely, was the source of the gas somewhere in Ohio, the gas that was sold to the customer?

A. Yes.

Q. Is that how that arose? Okay. Depending upon the particular contracts that Access has, does title to the gas pass at different points, or is it always at the initial receiving point?

A. It's typically at the initial receiving point.

Q. Are there exceptions to that?

A. Yeah. There can be exceptions. An example would be where we happen to hold a transportation agreement on a receiving pipeline where we would act as shipper.

Q. That wasn't the case with General Motors, [II-172] however; is that right?

A. That's correct.

Q. With respect to the General Motors contract that's been identified as Exhibit-A, the contract itself?

A. (Witness nodded.)

Q. Okay. In respect to that contract, Access sold gas to General Motors; is that correct?

A. Yes.

Q. Is it also correct that Access did not own or physically control any of the facilities over which that gas was transported or delivered to General Motors?

A. That is correct.

MR. HUBBARD: I have no further questions of the witness.

THE EXAMINER: Thank you, Mr. Hubbard. Mr. Duffy, anything further?

RECROSS-EXAMINATION

BY MR. DUFFY:

Q. The gas that was sold to General Motors Corporation, or Appellant's Exhibit-A, you are saying that none of it went through any of the [II-173] facilities that you said you owned in Texas.

A. That's correct.

Q. Were those just different wells; is that what you're saying?

A. Well, the receipt points in-A were in Louisiana.

Q. I thought you said there was one in Texas.

A. Texas Gas Transmission was the pipeline. I don't think there was one in Texas.

Q. I'm sorry. I thought you said there was one point of delivery in Texas?

A. I would have to look at the contract to see if there were. (Pause.) There are four delivery points listed in the initial receiving pipeline, and all four of those points are in Louisiana.

Q. You're looking at Exhibit A-1 to the agreement?

A. Page 28. That's correct.

MR. DUFFY: Thank you. I have no further questions.

THE EXAMINER: Mr. Hubbard, did you have anything further?

MR. HUBBARD: Nothing further of this witness.

[II-174] THE EXAMINER: Thank you, Mr. Jaffee. You may step down. Thank you very much. (Witness excused.)

* * * *

[II-178] * * * *

Thereupon, Appellee's Exhibits F and G were marked for purposes of identification and were received into evidence and made a part of the record herein.

THE EXAMINER: Mr. Hubbard, you may call your next witness.

MR. HUBBARD: Your Honor, we would call Mr. Peters to the stand.

(Witness sworn.)

THE EXAMINER: Thank you. You may be seated.

* * * *

[II-180] William T. Peters

being first duly sworn, as prescribed by law, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HUBBARD:

Q. Bill, would you state your full name for the record.

A. William Thomas Peters.

Q. What is your work address?

A. My work address is 30 East Broad Street, Rhodes State Office Tower, 21st floor, Columbus, Ohio.

Q. By whom are you employed?

A. The Ohio Department of Taxation.

Q. What is your current position?

A. I am currently a Tax Commissioner Agent Supervisor.

Q. And what area of law do you work in?

A. I work in the Public Utility Tax Section.

Q. How long have you held your current position?

A. I have currently been a supervisor since 1 September of 1986.

Q. And that's been with the Public Utility Tax Section?

A. That's correct.

Q. What are your duties?

[II-181] A. I supervisor a group of agents who audit the reports required to be filed by public utilities with the Tax Commissioner.

Q. How long have you been employed by the Department of Taxation?

A. For 20 years.

Q. What is your educational background?

A. I hold a Bachelor of Business Administration from from Ohio University.

Q. Could you briefly outline for the Board your employment history after graduating from Ohio University?

A. I was hired by the Department of Taxation in September of 1972. I was assigned to the Columbus District Office in the sales and use tax area. I worked there for approximately a year, and then was reassigned to the corporate franchise tax area.

I worked in that area as an agent until 1980, at which time I transferred to the Public Utility Tax Division and worked there as an agent auditing returns until 1986, at which time I was moved up to a supervisory position.

Q. In your capacity in the last — how many years have you worked in the public utility tax section?

A. It would be almost 13 years now.

[II-182] Q. During that time, have you had occasion to become involved with natural gas companies and pipeline companies —

A. Yes.

Q. — as far as their public utility tax reporting?

A. Yes.

* * * *

[II-184] * * * *

Q. Bill, could you read the definition of "natural gas company" as set forth in 5727.01(E)(4), please?

A. 5727.01(E)(4) states, "Any person is a natural [II-185] gas company when engaged in the business of supplying natural gas for lighting, power or heating purposes to 3 consumers within this state."

Q. Is that the statutory definition of natural gas company that was in effect during the audit period here which ran roughly from October of '86 through December of 1990?

A. Yes.

Q. Under what circumstances would a seller of natural gas to consumers in this state be considered by the Public Utilities

Commission to be a "natural gas company" within the meaning of the statute?

* * * *

[II-186] * * * *

THE EXAMINER: Mr. Hubbard, would you like to restate your question.

MR. HUBBARD: I asked the question as Public Utility Tax Section, but I would be glad to say it again.

BY MR. HUBBARD:

Q. Under what circumstances would a seller of natural gas to consumers in this state be considered by the Public Utility Tax Section to be a "natural gas company" within the meaning of the statute?

A. An entity would be considered a natural gas company when it's engaged in the business of supplying natural gas to consumers within this state. To be considered supplying gas, the seller of the natural gas to the —

* * * *

[II-188] * * * *

Q. Can you continue from there?

A. The seller of the natural gas to consumers would have to deliver the natural gas to consumers over pipeline facilities that were owned by the seller of the natural gas or controlled by it.

Q. By "controlled," what do you mean?

A. It would be possible that a company could lease pipeline facilities from another entity and they could move the gas over that pipeline having control over it, that they were operating the facility.

Q. Under what circumstances would a seller of [II-189] natural gas to consumers in the state not be considered by the Public

Utility Tax Section to be a natural gas company within the meaning of the statute?

* * * *

THE WITNESS: A seller of natural gas who is considered to be a marketer or broker of natural gas and does not own any facility points or control any pipeline facility to deliver such gas would not be considered a natural gas company within the definition stated here.

BY MR. HUBBARD:

Q. You mentioned facilities or pipeline facilities, by that what do you mean?

A. The actual pipeline and all equipment hooked up [II-190] to it to move the gas to a certain point. You have regulating equipment, compressor equipment and a lot of other equipment that's involved in moving the gas.

Q. To the knowledge of the Public Utility Tax Section, do the companies that file as natural gas companies for public utility tax purposes require the criteria that you have just testified to for being a natural gas company?

A. Yes. To meet the criteria that you have.

Q. What sources of information do you use to acquire knowledge as to whether the criteria have been met?

A. Information supplied by the company as to their operation, information they may submit to the Public Utilities Commission of Ohio, information that they may be supplying to the Federal Energy Regulatory Commission. All of these would go into determining whether such company would be qualified as a natural gas company under 5727.01(E)(4).

Q. Under the public utility tax law as applied by the Public Utility Tax Section, is there a distinction between pipeline companies and natural gas companies?

A. Yes, there is.

Q. And I'd like to refer your attention to the definition of pipeline company that's contained in Section 5727.01(E)(5). Could you read that for the [II-191] record?

A. 5727.01(E)(5) states "Any person is a pipeline company when engaged in the business of transporting natural gas, oil or coal or its tariffs through pipes or tubing either wholly or partially within this state."

Q. Does the Public Utility Tax Section draw a distinction between a pipeline company and a natural gas company?

A. Yes.

Q. Okay. What is that distinction?

A. A pipeline —

* * * *

[II-193] * * * *

THE WITNESS: A pipeline company will move a commodity; in this case, natural gas. They will move it through their transmission system, and it is called a transmission system under Federal Energy [II-194] Regulatory Code definition. And such gas will be moved to a point where it is usually given to a local distribution company.

They do not deliver to the end consumer. They deliver to another entity who then delivers the gas to the end consumer. The natural gas companies are companies that supply gas to residential, commercial and industrial customers within the state.

The pipeline company brings the gas to the local distribution company, but not does not supply it to the end users.

BY MR. HUBBARD:

Q. Are the pipeline companies typically engaged in selling the commodity itself as opposed to selling the service of transporting it only?

A. I would say currently they are involved more in the transportation of the natural gas.

Q. Was that true during the 1987 through 1990 period?

A. That I would not be sure about without going back and looking at reports filed by the pipeline companies.

Q. When referring to pipeline companies, is the term "transmission" proper to use?

A. Yes.

Q. Is that distinguished from some other kind of [II-195] property that is used to transport natural gas?

A. Yes. Within the property classification of a natural gas pipeline company, you have production plants, you have storage plants, you have transmission plants, you have distribution plants, and you have general plants. Each one has a specific way of being used which differentiates it from a different class, so they are bound by the particular function they perform.

Q. Okay. Is there a distinction between distribution and transmission property?

A. Yes, there is.

Q. What is that distinction?

A. The transmission property is the property that's bringing the gas, which could be from a wellhead or a storage area, or from a production area to an interconnection with a distribution point. Then it connects with this distribution point. The pressure of the gas is lowered at that point, and then it's put into the distribution system to go to the end user.

Q. So it has to go through a distribution system in order for it to be delivered to the end user, customer?

A. Yes.

* * * *

[II-196] * * * *

Q. Is it necessary in order for the gas to be usable by the end user for it to undergo this depressurization at some point before it's usable by the end user?

A. Yes.

Q. As applied by the Public Utility Tax Section in order to be a pipeline company, would it be necessary to own transmission facilities?

A. Yes.

Q. Would that also be true for a natural gas company?

A. Yes.

Q. I am asking whether it would be necessary in order to be a natural gas company that that company have transmission property as you have used that term?

A. A natural gas company?

Q. Right.

A. No. A natural gas company would have to have distribution property. They could have transmission property, that is possible, but they would have to have [II-197] distribution property moving and supplying gas to the consumer.

Q. Okay. You're defining distribution property as property that is used to deliver the natural gas to the consumer?

A. Yes.

Q. I have just a brief question or two about Exhibit 5. Just a clarificatory matter on a small point. This has been previously identified as Appellant's Exhibit 5; a printout of companies that are filing as natural gas companies for public utility tax purposes that actually filed for the tax years 1987 through 1991. Could you inform the Board as to why there are some Ys in these columns and there are also some N's and what the significance of that is?

A. The Ys indicate that a particular company for a particular year did file a tax return. Where there is an N, it indicates that the company did not file a tax return, nor was it required to file a tax return by the Tax Commissioner.

MR. HUBBARD: I have no further questions of the witness at this time.

THE EXAMINER: Thank you, Mr Hubbard. [II-198] Mr. Peters, I would like to apologize. I called you Mr. Peterson. Mr. Duffy, do you have any cross-examination for the witness?

MR. DUFFY: * * * I have some questions, yes.

CROSS-EXAMINATION

BY MR. DUFFY:

Q. Mr. Peters, I would like to clarify a few things that you have testified to today. First of all, you said a transmission company could not sell gas directly to end users; is that correct?

A. That's my understanding.

Q. Might you be wrong in that understanding in that they can only not do that when the area is serviced by a local distribution company?

A. It could be possible that a pipeline company is delivering gas directly to a customer. I am not aware of anybody in Ohio that is doing that. It is possible that I could be wrong. It could be going on in other states.

Q. Well, for example, if there were testimony in [II-199] this case that it was done at the General Motors Defiance Foundry plant for years and years before the Ohio Gas Company was formed, would that surprise you?

A. That would be something I was not aware of.

Q. Okay. This occurred during the '80's when you were working for the public utilities division.

THE EXAMINER: Is that a question, Mr. Duffy?

BY MR. DUFFY:

Q. I'm saying that's what the testimony is. You don't have any knowledge of the fact that a natural gas company service area was expanded to include the Defiance Central Foundry plant, and that prior to that time the G.M. plant was served by a transmission company or pipeline company as you have called it?

A. No, I was not aware of that.

Q. These end users of natural gas, industrial end users, they could have their own regulation equipment, can't they?

A. That could be possible.

[II-200] Q. So it's not necessary to have a distribution company deliver the gas to their plants in order to use it, is it?

A. That could be possible.

Q. But you would agree that regardless of whether natural gas is delivered to an industrial consumer in Ohio by a local distribution company, a pipeline company or anybody that it's going to come in through a pipe or a conduit, isn't it?

A. Yes, it would come in through a pipeline.

Q. A pipe or some type of enclosed structure. Prior to 1982, could companies market gas directly to end users if they were not a regulated utility?

MR. HUBBARD: Could I have a repeat of that question. I didn't get the date, the year.

THE EXAMINER: I believe Mr. Duffy said prior to 1982.

MR. HUBBARD: Okay.

THE WITNESS: I could not say.

BY MR. DUFFY:

Q. Okay. Are you aware that at some point in time the orders were issued by the Federal Energy Regulatory Commission allowing this to occur, and that is why you have these marketers of natural gas coming into existence?

A. Yes, I was aware of.

Q. Okay. Did Ohio do anything to amend its tax laws as the Federal Energy Regulatory laws changed?

A. There was no change in the statute definition or [II-201] procedures to tax natural gas companies.

Q. The word "supplying" in the phrase "supplying natural gas" is used in the definition of a natural gas company, isn't it?

A. Yes, it is.

Q. Does the department have a regulation defining the word "supply"?

A. Not that I am aware of.

Q. Do they have any written orders or instructions to the Tax Commissioner or to tax agents on this?

A. Not that I am aware of.

Q. Have you ever seen any cases where the term has been defined by the Board of Tax Appeals or any court?

A. No, I have not.

Q. How did you develop your policy then?

A. This is a policy that has been passed on to me from people who were employed there previously.

Q. So you are talking about a policy that's just been explained to you?

A. Yes.

Q. You talked about a company leasing a pipeline. Are you aware of anyone who does this?

A. Yes, I am.

Q. Who is that?

* * * *

[II-203] * * * *

THE WITNESS: The Verona Natural Gas Company leases a pipeline facility which they operate. They do not own the pipeline, they operate it.

BY MR. DUFFY:

Q. Who do they lease it from?

A. From the City of Verona.

Q. Is that the only one that you are aware of?

A. Yes, that is.

Q. You have talked about ownership or control. I take it that the concept of ownership can include either legal title or equitable title to the property. By "equitable title," I mean having the lease. Is that what you mean by "ownership," or do you include — do you think that ownership means having legal title to a control, meaning lease?

A. The way I am stating it, the ownership is the actual control and title to it, and the leasing is a lease which the company operates the pipeline.

Q. On behalf of somebody else or for their own benefit? Or could it be both?

A. It's conceivably could be both.

Q. Is there any written document in the department [II-204] that defines what ownership or control is within the meaning of the testimony you have given here today?

A. No, there is not.

Q. Have you had occasion to look at any of the contracts that General Motors Corporation might have regarding transportation of natural gas into Ohio?

A. No, I have not.

Q. Have you had any occasion to look at any of the contracts that a company like Mobile Natural Gas, Inc. might have with regard to the transportation of gas into Ohio?

A. No, I have not.

Q. So you don't know whether they have any control over the facilities or not then, do you?

A. Not on that basis, no.

Q. Can a contract, in the view of the Public Utility Tax Division, create a right to control when there is no actual operation by the person contracting for the right to use the property?

A. We would not consider someone who has contracts to have their gas moved over someone else's pipeline as the operator. We consider the operator the actual company which maintains the lines and operates the lines.

Q. So you require operation, not just the right to [II-205] require that they move your gas for you?

A. Yes. You have to operate the pipeline.

Q. Having the right to nominate and to require that it be done in lieu of anything else isn't sufficient control in your mind?

A. No, it's not.

Q. Was this policy developed after 1982, because before 1982 it wouldn't have happened?

A. That's probably what would have come into play sometime after that as the marketing of natural gas changed.

Q. Why was it necessary for the department to develop this policy?

A. I believe since I was not involved in that that a distinction had to be drawn between the various types of entities that were supplying natural gas.

Q. If someone sells natural gas to General Motors, say, in the State of Texas or the State of Louisiana, and title passes and delivery passes to General Motors, possession passes to General Motors down there, even if that company were a natural gas company in Ohio and filing returns for the money that it was paid on that sale it would not be gross receipts from business done within Ohio, would it?

A. The money that would be reported on the gross [II-206] receipts report would be transportation charges for —

Q. I didn't say transportation charges.

MR. HUBBARD: Allow him to answer the question.

BY MR. DUFFY:

Q. I said the sale of the natural gas. Are you going to assume some different facts in answering my question?

A. No.

Q. Okay. In case you misunderstood me, there is no transportation. This is just a sale with a transfer of title and possession in which General Motor arranges for transportation with someone else. The receipts from the sale of the gas at that point by the natural gas company, even if it did file an Ohio gross receipts excise tax return, would not be gross receipts from business done within Ohio, would it?

A. If that company did not make the sale. I'm not sure who has made the sale in your scenario.

Q. The company — the natural gas company did make the sale. The sale was just made outside of Ohio, as opposed to inside the state of Ohio.

A. When you say — You are talking about the local distribution services company that services the area [II-207] the industrial customer is located in?

Q. They may be a producing company as well as a distribution company. That can occur, can't it?

A. Yes. They could have production facilities.

Q. And they could have production facilities outside the State of Ohio, too, couldn't they?

A. Yes, they could.

Q. Let's go back to my question. If they sold some production facility located outside the State of Ohio and title and possession of the gas passed at that point and the company derived no other revenue other than from that out-of-state sale on that particular transaction, that revenue would not be gross receipts from business done within Ohio, would it?

A. We would not tax that as gross receipts — as Ohio intrastate gross receipts.

Q. What about if there was a contract for sale and then there was a separate contract for delivery and there was delivery into Ohio? What portion of the receipts would be taxed?

A. We would probably look at where the gas is coming from. If the gas is just going into a storage pool here in Ohio and the natural gas company is required to provide natural gas service to it, that would just be considered an Ohio sale because the sale would be [II-208] coming from a pool here in Ohio to meet the obligation of the contract to deliver gas to the customer.

Q. Local distribution companies no longer just sell tariff gas, do they?

A. No, they do not.

Q. They sell nontariff gas also?

MR. HUBBARD: Could we have a time frame for that?

BY MR. DUFFY:

Q. When did you become aware that local distribution companies were selling nontariff gas?

A. I don't know if I could give you a year on that.

Q. Has it been more than a year ago?

A. Probably.

Q. They do sell nontariff gas to industrial customers just like marketers do, then don't they?

A. I believe they do.

MR. HUBBARD: Again, we are talking about a time frame that may be outside the audit period?

MR. DUFFY: What difference does it make?

MR. HUBBARD: Well, I am just asking. You're asking now as opposed to the audit period?

[II-209] MR. DUFFY: He doesn't know what they were doing. Either they were or they weren't.

MR. HUBBARD: Okay. Just so that's clear that he's not testifying to the audit period.

THE WITNESS: I believe they are doing that. Without looking at one of their reports, I cannot state for certain that they are selling both types of gas.

BY MR. DUFFY:

Q. When they are selling nontariff gas, are they still supplying to the customer?

A. If there is no differentiation between tariff and nontariff, it says supplying nature gas.

Q. What if all they do is arrange for the sale and somebody else delivers it?

A. Then we would not consider them a natural gas company, if they are merely marketing or brokering the gas.

Q. I am saying that a local distribution company is selling nontariff gas, but they don't actually deliver it to the end user, somebody else does.

A. That would be a sale of gas by the local distribution company because they are selling the gas.

Q. But it's not supplying

A. (Witness nodded.) In that scenario.

[II-210] Q. Sorry. You're indicating —

A. In that scenario, they would not be directly supplying if they are arranging for the gas to be moved by some other means other than their own system.

Q. Okay. So if I understand your definition of supplying, it encompasses distribution to the end user?

A. Yes. They would be supplying natural gas to the end user through their distribution system.

Q. Do you know why the public — do you know why there is a — Strike that. Are you aware of the definition of a natural gas company in Section 905.03 of the Revised Code?

A. I am aware that it is significantly different than the one contained in 5727.01.

Q. I'd like to refer you to Exhibit 4 which was marked here previously. It's a copy of Revised Code Section 905.03. I would refer you specifically to subdivision (A)(6) of that definition. Take a moment to read it, please.

A. (Witness complies.)

Q. You would agree, would you not, that the first part of that definition, and I will read it to you, the phrase that says, "A person is a natural gas company when engaged in the business of supplying natural gas for lighting, power and heating purposes to

consumers [II-211] within this state." That is the same definition that you find in 727.01(D)(4), isn't it?

A. Yes, it is.

Q. Okay. And further on in there they talk about a producer being relieved of the obligation of compliance with certain sections of Title 9 of the Revised Code as long as that producer does not engage in the transportation or does not engage in the distribution of gas to consumers. Doesn't that seem to imply in your mind that distribution — that if you are not distributing natural gas, you're still a natural gas company?

A. The implication in that section would seem to lead to that.

Q. Do you know whether or not the Public Utility Tax Division has considered that implication when adopting the policy that you just described here?

A. No. I do not know if they have or not.

MR. DUFFY: I don't have any further questions of the witness.

THE EXAMINER: Thank you, Mr. Duffy. Mr. Hubbard.

MR. HUBBARD: Yes, your Honor.

[II-212] REDIRECT EXAMINATION

BY MR. HUBBARD:

Q. Bill, with respect to that last question, the part of the definition in the Public Utility Regulatory Law defining natural gas company, it says — a reference is, "A producer of natural gas is not required to comply with the jurisdiction of the PUCO if it doesn't distribute gas." That's with respect to producers, right?

A. The language does talk about producers supplying gas and gas being produced by such producers.

Q. So can the inference be drawn that the production is a form of supply with respect to that definition?

* * * *

[II-214] * * * *

Q. I will amend my question to does the fact that the statute references producers of natural gas indicate to you that production may be a form of supplying?

A. That could be taken from the way it's written here.

MR. HUBBARD: I have no further [II-215] questions of the witness, your Honor.

THE EXAMINER: Mr. Duffy, recross.

RECROSS-EXAMINATION

BY MR. DUFFY:

Q. Doesn't that provision talk about producers selling natural gas to consumers as long as they don't distribute what they sell?

A. The term "selling" or "sales" is not used in here. It talks about a producer supplying to one or more gas or natural gas companies such gas that's produced by the producer.

Q. But that section, doesn't it make a distinction between consumers and other public utility consumers, and other public utilities are not included within the meaning of that phrase "consumers" in there, are they?

A. I don't know.

MR. DUFFY: Okay. Thank you. I have nothing further.

THE EXAMINER: Thank you, Mr. Duffy.

Mr. Hubbard, anything further?

MR. HUBBARD: No, your honor.

THE EXAMINER: Mr. Peters, thank you very much. You may step down. (Witness excused.)

* * * *

[II-225] * * * *

Thereupon, Appellee's Exhibit H was received into evidence and made a part of the record herein.

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[II-229] * * * *

Thereupon, Appellee's Exhibits A, B and C were received into evidence and made a part of the record herein.

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[II-232] THE EXAMINER: We can go back on the record.

While we were off the record, Mr. Hubbard reviewed what had previously been received into evidence as Appellee's Exhibit H.

Mr. Hubbard, if you would like to elaborate on what occurred off the record.

MR. HUBBARD: Thank you, your Honor.

What I have done is taken the pages of the Ohio Corporate Franchise Tax Return certified by the Tax Commissioner and excised or deleted from those pages the ones that had financial information on them.

In some instances, I wanted a particular page still in the record for purposes other than disclosing of the company's total figures, and have deleted those amounts on those particular pages so that all that's left is information concerning the Ohio contacts that the company had with the state.

I believe it's such that it's not possible to — what I have done by deletion, you can't see under those figures. So there shouldn't be any information in there that would cause Mobile Natural Gas Company any concern.

I have also noted that where I have [II-233] deleted it, and I signed by my name to it indicating that I deleted it.

THE EXAMINER: All right.

Mr. Duffy, aside from your relevancy objection that you raised previously, which I'll assume is a continuing objection regardless of whether portions of this exhibit are redacted or removed, would you like to make a statement for purposes of the record?

MR. DUFFY: Mr. Hubbard's statement about what he's done with regard to removing certain pages of returns and deleting information on other pages is accurate. It's not for me to say whether that will satisfy the concerns of Mobile or not.

THE EXAMINER: Thank you, Mr. Duffy.

As I had previously indicated, the interested parties may file a brief with the Board by May 26th, 1993 regarding the preliminary receipt of this document marked Appellee's Exhibit H into evidence.

In the event that there is no such brief filed, my ruling will become final, only subject to the ordinary course of the Board's review of the records in this case.

* * * *

[Filed July 9, 1993]

[11] that GM required for the operation of various facilities in both Ohio and Michigan. Neither dictionary definition requires that the seller (supplier) actually deliver the item furnished to the specific location or facility where it will be used or consumed by the buyer.[7]

The Commissioner's application of the term "supplying" in R.C. 5727.01(E)(4) is also inconsistent with the term "supplying" as used in R.C. 4905.03(A)(6). There, the term "supplying" is used in an identical context. However, that definition of a "natural gas company" contains exceptions for certain activities not included in R.C. 5727.01(E)(4). In addition, that definition states that certain persons who might otherwise be a "natural gas company" can apply for relief from regulation by the Public

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[7] GM has also alleged in its notices of appeal to this Board that the Commissioner's application of R.C. 5739.02(B)(7) to deny the exemption from Ohio use tax claimed here burdens interstate commerce and, thus, violates the Commerce Clause of the United States Constitution. While this Board cannot decide the constitutional issue presented by GM (*Cleveland Gear Co. v. Limbach* (1988), 35 Ohio St. 3d 229; *S.S. Kresge Co. v. Bowers* (1960), 170 Ohio St. 405, *syl. 1, appeal dismissed,* 365 U.S. 466 (1961)), the Commissioner admitted at the hearing that any natural gas purchased outside the state of Ohio by GM which is then transported to Ohio for use by GM could never qualify for exemption from taxation under his application of R.C. 5739.02(B)(7). Clearly, Ohio cannot subject property purchased outside of Ohio to tax when that property would not be subject to tax if purchased inside of Ohio. *Boston Stock Exchange v. State Tax Commissioner* (1977), 429 U.S. 318; *American Modulars Co. v. Lindley* (1978), 54 Ohio St. 2d 273, *cert. denied*, 439 U.S. 911 (1978); *Dayton Power & Light Co. v. Lindley* (1979), 58 Ohio St. 2d 465. Accordingly, this Board should not accept a construction of a statute that would conflict with the Commerce Clause of the United States Constitution.

OHIO BOARD OF TAX APPEALS

Chrysler Corporation,	)	CASE No. 91-K-1523
	)	
Appellant,	)	
	)	
vs.	)	(SALES AND USE TAX)
	)	
Roger W. Tracy, Tax	)	DECISION AND ORDER
Commissioner of Ohio,	)	
	)	
Appellee.	)	

APPEARANCES:

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Columbus, Ohio 43215

This cause and matter is before the Board of Tax Appeals as a result of a notice of appeal filed on November 19, 1991, by appellant, Chrysler Corporation. Appellant appeals a final order of the Tax Commissioner dated September 30, 1991, in which he denied appellant's objection to the assessment relating to the period of January 1, 1987 through June 30, 1990, but conditionally remitted a portion of the penalty.

In its notice of appeal, appellant specifies the following as error committed by the Tax Commissioner in rendering his final order:

"1. The Tax Commissioner erred in finding that the Appellant is subject to sales tax on the purchase of natural gas from Yankee Gas Company and in holding that Yankee Gas Company was not a natural gas company as defined in R.C. [section] 5727.01. Purchases of natural gas from a natural gas company as defined in R.C. [section] 5727.01 are exempt from the sales tax pursuant to [section] 5739.02(B)(7). Yankee Gas Company properly sold natural gas through a pipeline to the Chrysler Twinsburg Stamping Plant and such sales by Yankee Gas Company and purchases by Chrysler were not subject to the tax under [section] 5739.02(B)(7). Yankee Gas Company is a natural gas company engaged in the business of supplying natural gas for lighting, power or heating to consumers within the State of Ohio. Yankee Gas Company is not engaged in some other primary business to which the supplying of natural gas is subordinate, does not supply natural gas to tenants, nor is it engaged in producing, refining, or marketing of petroleum or petroleum products. The purchases of natural gas from Yankee Gas Company are not subject to the Ohio sales tax.

"2. The Tax Commissioner erred in not remitting entirely the sales tax penalty, the use tax penalty and the pre-assessment interest."

This matter is now considered by the Board of Tax Appeals based upon appellant's notice of appeal, the statutory transcript certified to this Board by the Tax Commissioner pursuant to R.C. 5717.02, the evidence presented at the hearing held before

this Board on August 12, 1992, and the post-hearing briefs submitted by the parties.

Throughout the period at issue, appellant purchased natural gas for heating its plant located in Twinsburg, Ohio. All of appellant's purchases at issue were made pursuant to a "Natural Gas Sales Agreement" ("Agreement") originally entered into between appellant and Yankee Resources, Inc. ("Yankee Resources"), on November 6, 1986, which included several subsequent price modifications thereto. Payments made by appellant for its purchases of natural gas were remitted to Yankee Resources until February 1988 when its intermediate holding parent corporation, Yankee Gas Company ("Yankee Gas") was acquired by Access Energy Corporation ("Access Energy"). From February 1988 throughout the remainder of the assessment period, appellant remitted payment for its natural gas purchases to Access Energy.

Appellant was assessed for its purchases of natural gas for the audit period and thereafter filed a petition for reassessment and remission of penalty on the basis that its purchases were exempt from sales tax pursuant to R.C. 5739.02(B)(7). The Tax Commissioner denied appellant's objection to the assessment on the basis that appellant had failed to demonstrate that its purchases of natural gas were from a natural gas company as defined in the Revised Code. Appellant then filed its notice of appeal with this Board.

We begin our review of this appeal by recognizing the presumption that the findings of the Tax Commissioner are valid. *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St. 3d 121. It is incumbent upon a taxpayer challenging a finding of the Tax Commissioner to rebut that presumption and establish a right to the relief requested. *Belgrade Gardens v. Kosydar* (1974), 38 Ohio St. 2d 135; *Midwest Transfer Co. v. Porterfield* (1968), 13 Ohio St. 2d 138. Moreover, the taxpayer is assigned the burden of showing in what manner and to what extent the Tax Commissioner's determination is in error. *Federated Dept. Stores, Inc. v. Lindley* (1983), 5 Ohio St. 3d 213.

As a preliminary matter, we note that R.C. 5739.02 levies an excise ("sales") tax on all retail sales made in Ohio. A similar excise ("use") tax is imposed by virtue of R.C. 5741.02. If the acquisition of an item is exempt from sales tax, it follows that it is also exempt from use tax. R.C. 5741.02(C).[1]

In the present case, appellant argues that its purchase of natural gas is not subject to taxation based upon the exemption enumerated in R.C. 5739.02(B), which provides in pertinent part:

"The tax does not apply to the following:

"***

"(7) Sales of natural gas by a natural gas company, of electricity by an electric company, of water by a water-works company, or of steam by a heating company, if in each case the thing sold is delivered to consumers through wires, pipes, or conduits, and all sales of communications services by a telephone or telegraph company, all terms as defined in section 5727.01 of the Revised Code[.]"

Accordingly, the crucial issue which must be determined by this Board is whether Yankee Resources or Access Energy constitutes a natural gas company for purposes of R.C. 5739.02(B)(7). As referenced in R.C. 5739.02(B)(7), the term "natural gas company" is defined in R.C. 5727.01, which provides in part:

"As used in this chapter:

"(A)'Public utility' means each person referred to as a telephone company, telegraph company, electric company, natural gas company, pipe-line company, water-works company,

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[1] Given that the analysis of the application of the sales and use tax provisions is essentially identical in this context, we will refer only to the applicable sales tax provisions throughout the remainder of this decision and order.

water transportation company, heating company, rural electric company, or railroad company.

"***

"(E) Any person:

"***

"(4) Is a natural gas company when engaged in the business of supplying natural gas for lighting, power, or heating purposes to consumers within this state[.]"

Thus, in order to qualify as a natural gas company, the entity at issue must be in the business of supplying natural gas to Ohio consumers for the purpose of lighting, power, or heating. Given the arguments raised by the parties, we also find it appropriate to note the provisions of R.C. 5727.02:

"As used in this chapter, 'public utility,' 'electric company,' 'natural gas company,' 'pipe-line company,' 'water-works company,' 'water transportation company' or 'heating company' does not include:

"(A) Any person that is engaged in some other business to which the supplying of electricity, heat, natural gas, water, water transportation, steam, or air to others is incidental;

"(B) Any person that supplies electricity, natural gas, water, water transportation, steam, or air to its tenants, whether for a separate charge or otherwise; or

"(C) Any person whose primary business in this state consists of producing, refining, or marketing petroleum or its products."

Although appellant introduced into evidence the Agreement and an informational brochure which Access Energy provides to certain of its potential customers, appellant has not directed this Board's attention to any of the specific terms of either document in support of its argument. We therefore set forth those portions of each document which we find particularly relevant.

We first refer to the Agreement which provides in part:

"THIS AGREEMENT made and entered into on the date specified with the execution hereof by and between YANKEE RESOURCES, INC. ('Seller') and CHRYSLER CORPORATION ('Buyer'), a customer of The East Ohio Gas Company ('East Ohio').

"R E C I T A L S

"WHEREAS, Buyer is a customer of The East Ohio Gas Company (hereinafter called 'East Ohio') desiring to acquire natural gas ('gas') supplies and to obtain delivery of such gas to its facilities through East Ohio pipelines; and

"WHEREAS, Seller is in the business of acquiring natural gas supplies; and

"WHEREAS, Buyer desires to purchase gas supplies for its use from Seller;

"NOW, THEREFORE, in consideration of the mutual covenants contained herein, and other good and valuable consideration, the parties do hereby covenant and agree as follows:

"1. Agreement: Subject to the terms of this Agreement, Seller does hereby agree to sell to Buyer on a best efforts basis and Buyer does hereby agree to purchase during the continuing terms of this Agreement the volumes described herein.

"***

"3. Delivery Point and Facilities: Seller will sell and deliver gas to Buyer at the Delivery Point pursuant to the terms and conditions hereof. The term 'Delivery Point' shall mean the point or points of interconnection between Seller's supply of gas and the pipeline facilities of East Ohio for ultimate delivery to Buyer. The Delivery Point shall be at the inlet side of the various metering stations determined by the Seller hereunder. Seller shall be solely liable and responsible for said gas prior

to the time of delivery thereto to Buyer, and Buyer shall be solely liable and responsible for said gas thereafter.

"***

"6. Delivery of Gas and Purchase Quantities: Buyer agrees to purchase all of its gas requirements from Seller, other than those volumes of gas Buyer elects purchase from East Ohio pursuant to its regular service tariff, at the location(s) described in this agreement. It is estimated that such volumes shall be up to 2,150 Mcf of gas per day. Buyer herein affirms that it will purchase volumes from no other supplier, other than East Ohio, during the term of this Agreement. Purchases hereunder shall be deemed the first gas through the East Ohio meter at the Delivery Point each month. For information purposes only, Buyer's estimated monthly gas requirements are set forth on Exhibit A, attached hereto.

"***

"10. Title and Ownership: Title to and ownership of the gas delivered hereunder shall pass to and vest in Buyer at the Delivery Point. Seller warrants that it has good and marketable title to the gas being sold hereunder as and when delivered. Seller also warrants that such gas will be free and clear of all liens, encumbrances and adverse claims whatsoever which would interfere with or make wrongful Buyer's use of same. Seller agrees to indemnify and save Buyer harmless from all suits, claims, actions, accounts, debts, damages, costs, losses, expenses and other liabilities of any kind or type arising from or out of claims of any person or party regarding the ownership of the gas sold hereunder or Seller's authority to sell such gas."

Access Energy's marketing brochure elaborates upon its business, providing in part:

"Access Energy is the nation's leading index independent natural gas marketer not because of the commodity we provide, but because we develop innovative solutions to customer and supplier needs. From our headquarters in

Dublin, Ohio and offices in Chicago, Houston, San Francisco and Irvine, California, Access Energy manages natural gas deliveries from wellhead to burnertip.

"A creative idea that grew into a major organization, Access Energy began in 1982 as Yankee Resources, Inc. Following a 1988 management buyout, we selected 'Access Energy' as our name to reflect our mission of accessing new markets for our suppliers and customers.

"Today we sell natural gas to more than 8,000 customers representing virtually every type of North American industry and institution. ***

"***

"Access Energy provides more than a commodity. We help our customers become more efficient and effective in managing their natural gas purchases.

"Access Energy created the 'Access+Plus' program specifically to meet the needs of geographically diverse Fortune 500 companies with multiple facilities.

"When, for example, General Electric wanted a company-wide supplier of natural gas management services, GE turned to Access Energy.

"In addition, the world's largest paper company relies on Access Energy to supply natural gas to more than 25 North American plants. ***

"Access Energy also supplies Libbey-Owens-Ford's plants. Flexibility, reliability and responsiveness are equally important to this glassmaking giant. We pride ourselves on our ability to respond to our customers' needs - even under the most difficult circumstances.

"In January 1990, for example, Access used three interstate pipelines and three natural gas supply basins located thousands of miles apart to keep the glassmaker supplied and operational during a frigid month when other plants closed for lack of fuel.

"Honda has set new automotive standards for quality, efficiency and service. Anything short of 100 percent performance is unacceptable. And they place the same ultra-high standards on suppliers. Honda of America's plants rely on Access' expertise for cost-effective responses to transportation, supply and regulatory issues. We even have an Access associate working on-site at Honda headquarters to ensure it.

"***

"In 1986, Access Energy signed the nation's first multi-site contract for delivery of natural gas to quick service restaurants: 35 company-owned Wendy's International Restaurants and 31 company-owned Sister's Chicken and Biscuits Restaurants throughout central and northwestern Ohio. In addition, Access became the supplier to Wendy's Columbus-based bakery and corporate headquarters. ***

"***

"The Access Energy gas supply team is experienced, resourceful and flexible. Our transportation department has the knowledge and creativity to move gas when others cannot.

"We have forged long-term relationships with more than 300 major and independent natural gas producers operating in Appalachia, the Gulf Coast, the MidContinent, the Southwest and Canada.

"Our bonds with North American pipeline companies are equally strong. We are known and respected as the industry leader, and independent marketer with the know-how to match supply with market. We deliver gas to market ... and keep it flowing.

"While Access Energy is an old gas marketing company by industry standards, we are a young enterprise. We are a team of professionals with a tradition of innovation backed by expertise.

"Access became the first national independent marketer by aggressively seeking new ways to serve our customers. We invented the concept of total management of natural gas from wellhead to burnertip.

"Responsible for many industry first and regulatory changes, Access was the earliest transporter of direct purchase gas on many pipelines systems. We were the first marketer to export gas to Canada.

"Access was the first to serve commercial multi-sites, including hotels, restaurants, bowling alleys and laundromats. We were ahead of the pack in establishing the industry's first national accounts program for geographically diverse Fortune 500 companies."

Also included in Access Energy's informational brochure is an overview of the company which provides in part:

"Founded: Launched in 1982 as Yankee Resources, Inc., we were the first national independent natural gas marketer. Taking title to all gas bought and sold, we created the concept of direct purchase agreements between suppliers and customers. Our early transactions shaped the natural gas marketing industry of today.

"Philosophy: We secure access to markets and supply sources for industry participants while providing access to new ideas in gas marketing and transportation. We manage the flow of gas from wellhead to burnertip with a commitment to total customer/supplier satisfaction.

"Our Suppliers: We buy natural gas from 300-plus major and independent producers in these North American supply basins: Anadarko, Appalachian, Arkoma, Black Warrior, Gulf Coast, Hugoton, Michigan, Permian, Rocky Mountain, San Juan, Western Canada and Williston.

"Our Customers: We supply 4,000-plus pipeline, local distribution company, utility, commercial, industrial and institutional customers in these states and provinces: Arizona,

California, Colorado, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Kentucky, Louisiana, Maryland, Michigan, Missouri, Nevada, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, Tennessee, Texas, Virginia, West Virginia and Wisconsin, plus the District of Columbia and Ontario and Quebec, Canada."

We find the testimony of Lance W. Schneier, the former president of Yankee Resources, and current chairman, president and chief executive officer of Access Energy, particularly informative as to the business activities of Yankee Resources and Access Energy. Schneier described the companies' operations as follows:

"Q. Could you describe the business of Yankee Resources, Inc. during the assessment period, and if different at any point prior to that or subsequent to that? And the assessment period is from January of 1987 through June of 1990.

"A. Actually the business of Yankee Resources has remained constant throughout this decade, throughout the first ten years of our existence, that is 1982 through 1992.

"We are what is referred to in the natural gas industry as independent natural gas marketers. Those words mean, first, independent means that we are not affiliated or associated with any other industry segment, meaning we're not associated with a producer of natural gas. We're not associated with any pipeline company, with any local distribution company or any other public utility. That makes us independent.

"We are a marketer of gas, meaning that we acquire natural gas and provide the service using public utility or pipeline systems for the transportation of that gas for end-use customers, typically industrial customers. And also sell to some local distribution companies[.]

"***

"Q. Could you describe the circumstances and changes in the natural gas industry that led to the creation of private gas marketing companies such as Access Energy and Yankee?

"A. Originally the concept of gas marketing companies systems back in the gas curtailments of the 1970's when local distribution companies, particularly in Ohio, did not have sufficient gas supplies available to serve their customers.

"So in 1973, the Public Utilities Commission set up a procedure called the Self Help Program, whereby a producer of natural gas could directly sell their gas to end users, such as Chrysler or General Motors or General Electric.

"These firms would be interested in purchasing gas directly from producers because they couldn't get all the gas they needed from Columbia Gas Ohio or East Ohio or whomever. The gas was, of course, delivered through the pipeline system or transported through the pipeline system perhaps.

"Not surprisingly in retrospect, entities merged during that era to join those producers and those end users, sometimes they were brokers, meaning they would find a customer, find a producer, link them together, take a fee.

"And also they were in their infancy, a few marketers, being they would purchase the gas from the producer, take title to it, and then resell it to the end user.

"These were all pursuant to, as I said, PUCO program in 1973 that was expanded to the neighboring states, Pennsylvania Public Utilities Commission, Illinois Commerce Commission. Some of the neighboring states adopted the same plan because they were also short of gas.

"And then the Federal Power Commission, which is the predecessor to the Federal Energy Regulatory Commission, adopted a similar plan on a national basis. After the curtailments abated in the 70's, in the late 70's, it was determined that this process whereby typically an industrial customer, but not limited just to industrial customers, could go

out and buy gas from whomever they wanted and have that gas transported by a public utility became somewhat institutionalized, and there were other reasons to do so. Most notably price as opposed to security of supply.

"So this concept which was born during shortages became more popular as time went on. And it's now practiced by 350 or 500 companies throughout North America who purchase gas from thousands of producers and sell that gas to hundreds and thousands of end users throughout the country.

"All using the pipeline systems of the regulated public utilities, but, of course, those entities that are supplying that gas are not public utilities in Ohio or any of the other states in which they do business.

"It's grown to the point that nearly 90 percent of the gas that moves through the interstate pipelines is now being transported instead of bought and sold as it was done, let's say, prior to 1976.

"We are a participant in that industry by being one of the oldest natural gas marketers.

"***

"Q. Okay. Could you describe how Access became a successor in interest to Yankee Resources and I think Yankee Gas Company?

"A. In 1988 the management of Yankee Gas Company, myself included, purchased the Yankee Gas Company from its prior owners and renamed it Access Energy.

"Q. Who does Access purchase the natural gas from?

"A. Currently Access purchases natural gas from probably 250 or 300 natural gas suppliers, producers located in Appalachia, the Southwest, mid-continent area, Guld Coast and Canada.

"Q. And was that also true during the audit period?

"A. It would have been true during the audit period, but the number of suppliers would have been less.

"Q. How does the natural gas get delivered to the customers, the end-use customers of Access?

"A. The natural gas that we purchase is delivered by the pipeline systems, which existed throughout the United States, the interconnected grid of interstate pipeline systems.

"For example, we may buy gas in Texas from a well in Texas that's interconnected to a large pipeline system. We'll pay that pipeline system a fee to transport the gas from Texas to Kentucky, where it interconnected with another pipeline system.

"We'll pay that pipeline company a fee to bring it from Kentucky to a point where it interconnects with Columbia Gas of Ohio, then pay Columbia Gas of Ohio a fee to deliver it, if you will, to our customer.

"I use the words transport and deliver with a bit of caution, because an interesting aspect of the way this industry works is that it's all done by displacements. Not only do we not own the facilities, but the gas that is delivered is not the gas that we introduce.

"We buy ten units of gas in Texas and put it into the pipeline, and it's put into the pipeline. What the pipeline company does is take that gas from the well and credit our account for ten units of gas and those molecules are physically moved.

"They may be moved two miles down the road to somebody else, but an equal volume is then credited to our account and gives us the right to have it delivered elsewhere.

"An analogy is ATM, or automatic teller machines. You can put $100 in your bank account and you can go to La Guardia Airport, you go get $100 out. You don't get the same $100 out of the bank that you put in.

"Q. Does Access own or control any physical assets which are used for the distribution of natural gas to consumers?

"A. No, we don't." (Tr. 22-26, 28-29.)

The evidence demonstrates that Yankee Resources and Access Energy located natural gas producers and/or suppliers and customers wishing to purchase natural gas supplies. Although Yankee Resources and Access Energy would *temporarily* acquire title to the natural gas in order to assist in its transportation from producer and/or supplier to customer, neither company owned or controlled any physical assets necessary to produce, transport or distribute natural gas to its customers. Such a limited ownership interest in the natural gas does not outweigh the fact that Yankee Resources and Access Energy do not have the physical capabilities to produce or transport natural gas which might qualify them as natural gas companies.

In addition, the activities of Yankee Resources and Access Energy amply supply Schneier's description of the companies as independent natural gas marketers which simply manage natural gas deliveries. We agree with the Tax Commissioner's conclusion that Yankee Resources and Access Energy are in the business of brokering, or marketing, the commodity of natural gas. As we believe that it was not the intent of the General Assembly to include within the definition of natural gas company those entities which merely market natural gas, we must conclude that Yankee Resources and Access Energy fall outside the statutory definition of a natural gas company as set forth in R.C. 5727.01.

The Tax Commissioner also argues that this Board may rely upon an order of the Public Utilities Commission of Ohio ("PUCO") in which it was determined that Yankee Resources' natural gas marketing activities did not bring it within the definition of a natural gas company for Ohio Public Utility Regulatory purposes. In 1982, Yankee Resources applied to the PUCO for an order granting relief from compliance with the Public Utility Regulatory law reflected in R.C. Chapters 4901, 4903, 4905, 4907, 4909, 4921, 4923 and 4975, on the basis that

it was not a natural gas company within the meaning of R.C. 4905.03(A)(6) or a pipeline company within the meaning of R.C. 4905.03(A)(7).

The regulatory statute then at issue before the PUCO is found in R.C. 4905.03, which provides in pertinent part:

"As used in this chapter:

"(A) Any person, firm, copartnership, voluntary association, joint-stock association, company, or corporation, wherever organized or incorporated, is:

"***

"(6) A natural gas company, when engaged in the business of supplying natural gas for lighting, power, or heating purposes to consumers within this state, or when engaged in the business of supplying natural gas to gas companies or to natural gas companies within this state, but where a producer supplies to one or more gas or natural gas companies only such gas as is produced by such producer from wells drilled on land owned in fee by such producer or where the principal use of such land by said producer is other than the production of gas, within this state, such producer is not thereby a natural gas company. All rates, rentals, tolls, schedules, charges of any kind, or agreements between a natural gas company and other natural gas companies or gas companies providing for the supply of natural gas and for compensation for the same, are subject to the jurisdiction of the public utilities commission. The commission may, upon application made to it, relieve any producer of natural gas, defined in this section as a gas company or a natural gas company, of compliance with the obligations imposed by Chapters 4901., 4903., 4905., 4907., 4909., 4921., and 4923. of the Revised Code, so long as such producer is not affiliated with or under the control of a gas company or a natural gas company engaged in the transportation or distribution of natural gas or so long as such producer does not engage in the distribution of natural gas to consumers."

In ruling upon Yankee Resources' application, the PUCO issued an order determining that Yankee Resources was not a natural gas company or a pipeline company for public utility regulatory purposes, stating in pertinent part:

"2) Yankee Resources is or anticipates being a party to certain contracts pertaining to the purchase of natural gas from independent Ohio gas producers and from public utilities and the sale of such natural gas from these sources to various entities, including industrial end users, other public utilities, and interstate pipeline companies. Yankee Resources' contracts are or will be those involving Ohio producers' sale of all natural gas produced from specified wells to Yankee Resources, those involving spot purchases from public utilities, and those involving buyers of natural gas who agree to pay Yankee Resources for the natural gas production described in the purchase contracts. Approximately 90% of the volumes of natural gas transferred by these contracts is purchased by an interstate pipeline company.

"3) Yankee Resources receives compensation for its role in locating sellers and buyers and assisting them in their transportation arrangements pursuant to purchase and sale contracts. Management of these contracts is involved in the services which Yankee Resources performs. In short, the services performed are that of a marketer or broker of contracts for natural gas which services typically include taking legal title to the natural gas.

"4) Yankee Resources is not affiliated with or under the control of a gas company or a natural gas company engaged in the transportation or distribution of natural gas to consumers. Yankee Resources does not engage in the business of transporting natural gas through pipes or tubing either wholly or partly within this state as it has no physical plant through which natural gas is transported.

"5) Sections 4905.03(A)(6), Revised Code, sets forth the definition of a natural gas company as follows:

"A natural gas company, when engaged in the business of supplying natural gas for lighting, power, or heating purposes to consumers within this state, or when engaged in the business of supplying natural gas to gas companies or natural gas companies within this state.

"6) Section 4905.03(A)(7), Revised Code, defines a pipe-line company as follows:

"A pipe-line company, when engaged in the business of transporting natural gas, oil, or coal or its derivatives through pipes or tubing, either wholly or partly within this state.

"7) The Commission is of the opinion that Yankee Resources' activities are not the type which fall under either the definition of a natural gas company or a pipe-line company. Yankee Resources' operations consist of coordinating buyers with sellers of natural gas through certain contractual arrangements and assisting them in making arrangements and transportation of the gas. The applicant owns no physical facilities with which to transport gas. The Commission believes that the marketing or brokering of natural gas contracts is not an activity contemplated by Section 4905.03, Revised Code. Accordingly, the Commission finds that Yankee Resources is not a public utility and is not subject to the obligations imposed by Chapters 4901, 4903, 4905, 4907, 4909, 4921, and 4923, Revised Code.

"It is therefore,

"ORDERED, That the application of Yankee Resources, Inc. for Relief from Compliance with the Obligations Imposed by Chapters 4901, 4903, 4905, 4907, 4909, 4921, and 4923 of the Revised Code is granted.

"***"

As a result of the PUCO's order, Yankee Resources, and subsequently Access Energy, has never been subject to regulation as a natural gas company or other public utility for local, state or federal purposes. Consequently, for example, they have never

been obligated to, nor have they, hold themselves out to serve a general or indefinite public. Rather, each of these companies has chosen customers and negotiated with them on an individual, contract-by-contract basis. While we find the decision of the PUCO with regard to the application of Yankee Resources to be persuasive and in support of our decision rendered herein, we need not base our decision solely upon the determination of the PUCO given the other evidence pertaining to the business activities of Yankee Resources and Access Energy. Cf. *Akron Transportation Co. v. Glander* (1951), 155 Ohio St. 471.

We note that the Tax Commissioner has also argued that due to the tax filing history of Yankee Resources and Access Energy, the companies do not constitute public utilities and therefore are not natural gas companies. The Tax Commissioner has cited this Board's previous decision in *Central Trust Hardware Company v. Lindley* (Jul. 25, 1979), B.T.A. Case No. 78-C-244, unreported, in which this Board reject the taxpayer's claim to entitlement to sales tax exemption pursuant to R.C. 5739.02(B)(7) for its purchases of steam which was used to heat its building. This Board determined that the definition of "heating company" set forth in R.C. 5727.01 must be read in *pari materia* with the provisions of R.C. 5727.02, which exempted certain entities from the definition of heating company whose supplying of steam was incidental to some other primary business.

In holding that the selling entity did not constitute a heating company for purposes of the exemption enumerated in R.C. 5739.02(B)(7), the Board held:

> "[T]he legislature levies excise taxes on the earnings, inter alia, of heating companies, and, in an apparent attempt to avoid a duplicate tax, the legislature exempted from the sales tax transactions wherein qualifying entities sold utility commodities to consumers. These transactions might avoid all tax if we were to allow Central Trust's claim. Emery would collect no sales tax, and, being excluded from the definition of a heating company by [section] 5727.02, Ohio Rev. Code, would not be required to pay any utility excise taxes either."

Id. at 37.

We find that our reasoning in *Central Trust Company* supports our decision in the present case given the non-public utility status of Yankee Resources and Access Energy. Since these companies are not natural gas companies as defined in R.C. 5727.01, appellant was not entitled to the claimed exemption. Therefore, appellant's first specification of error is not-well taken and is therefore overruled.

Appellant also specifies as error the Tax Commissioner's refusal to remit the entire sales tax penalty and pre-assessment interest which was imposed in the present case. Pursuant to R.C. 5739.13, a mandatory penalty is to be imposed in the event of an assessment. However, the determination of whether to remit the penalty is discretionary. *Jennings & Churella Constr. Co. v. Lindley* (1984), 10 Ohio St. 3d 67, 69. Ordinarily, the taxpayer must demonstrates that there exists an abuse of discretion on the part of the Tax Commissioner before the determination in refusing to remit a penalty may be reversed or modified by the Board of Tax Appeals. *Id.*; *Interstate Motor Freight System v. Bowers* (1960), 170 Ohio St. 483, 485.

Specifically, we note the standard to be applied in determining whether an appellant has demonstrated that there exists an abuse of discretion. In *Huffman v. Hair Surgeon, Inc.* (1985), 19 Ohio St. 3d 83, the Supreme Court of Ohio held:

> '"[A]n abuse of discretion involves far more than a difference in * * * opinion * * *. The term discretion itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations. In order to have an 'abuse' in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias. * * *"' *State v. Jenkins*, (1984), 15 Ohio St. 3d 164, 222." *Id.* at 87.

We have already concluded that appellant has failed to meet its burden of proof necessary to support its claim that the Tax Commissioner erred in assessing appellant's purchases of natural gas. In reviewing the entire record, we are unable to conclude that appellant has demonstrated that the Tax Commissioner's decision not to remit the entire penalty constitutes an abuse of discretion.

However, with respect to the additional penalty which was imposed on the pre-assessment interest, we find that the Tax Commissioner was without authority to impose such penalty. *Tramp Enterprises v. Tracy* (Sep. 17, 1993), B.T.A. Case No. 92-R-4, unreported. See, also, *Ernst Enterprises, Inc. v. Tracy* (Dec. 23, 1992), B.T.A. Case No. 91-A-194, unreported. Accordingly to this extent, appellant's specification of error is well-taken and is sustained.

Based upon the foregoing, the Board of Tax Appeals finds appellant's first specification of error to be not well-taken and it is therefore overruled. With respect to appellant's second specification of error, it is sustained only to the extent that the Tax Commissioner improperly imposed a penalty on the pre-assessment interest which was included as part of the assessment in the present case. It is therefore the decision and order of the Board of Tax Appeals that the final order of the Tax Commissioner must be, and hereby is, affirmed in part and reversed in part.

I hereby certify the foregoing to be a true and correct cop of the action of the Board of Tax Appeals of the State of Ohio, this day taken, with respect to the above matter.

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Kiehner Johnson, Chairman

[Filed Feb. 25, 1994]

OHIO BOARD OF TAX APPEALS

General Motors Corporation, Appellant,	)	CASE NO. 91-K-1588
vs.	)	(SALES AND USE TAX)
Roger W. Tracy, Tax Commissioner of Ohio, Appellee.	)	DECISION AND ORDER

(Found in the Appendix to the Petition for Certiorari at 6a-19a.)

[Filed July, 28, 1994]

[17] Proposition of Law No. II:

THE COMMISSIONER'S APPLICATION OF THE OHIO SALES AND USE TAX LAWS VIOLATES THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION BECAUSE THE COMMISSIONER ALLOWS THE R.C. 5739.02(B)(7) EXEMPTION, ON SALES OF NATURAL GAS SOLD BY A "NATURAL GAS COMPANY," ONLY TO IN-STATE NATURAL GAS COMPANIES.[10]

The Commissioner interprets R.C. 5739.02(B)(7) to allow an exemption for a consumer's purchases of natural gas *only* where the seller of the gas transports the gas, through its own facilities, to the purchaser *in Ohio*. That is, GM had to purchase the gas *in Ohio* to qualify for the exemption. The Commissioner admits, consequently, that the exemption is only available for natural gas purchased in Ohio.

Since such an in-State sale would be subject to Ohio *sales* tax and not *use* tax, the Commissioner's interpretation eliminates the exemption for all out-of-State sales of natural gas. The result is that natural gas purchased in Ohio from someone who agrees to deliver the gas to the consumer comes tax-free, but gas purchased outside the State and later used in Ohio shoulders a use tax burden in every [18] instance. This "differential treatment of in-

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[10] The BTA held, incorrectly, that it "could rule upon [GM's] constitutional challenges with respect to the Tax Commissioner's application of a statute to a given set of facts," and proceeded to overrule each of GM's constitutional specifications of error. The BTA ignored *MCI Telecommunications Corp. v. Limbach* (1994), 68 Ohio St. 3d 195, 197-98, 625 N.E. 2d 597, 599, *petition for cert. filed* No. 93-1974 (June 7, 1994), where this Court held that "the BTA receives facts but cannot rule on the [constitutional] question[s]." Thus, the BTA's improper constitutional determinations are unlawful and are due no deference. *See also Cleveland Gear Co. v. Limbach* (1988), 35 Ohio St. 3d 229, 520 N.E. 2d 229.

state and out-of-state economic interests that benefits the former and burdens the latter" is "virtually *per se* invalid" under the Commerce Clause, *Oregon Waste Sys., Inc. v. Department of Env. Quality of the State of Oregon* (1994), 114 S. Ct. 1345, 1350, and it is certainly invalid here.

The factual underpinnings of GM's Commerce-Clause challenge are straightforward and undisputed. During the audit period at issue in this case (10-01-86 to 06-30-90), GM's Energy Supply Division purchased the great majority of its natural gas requirements from various out-of-State marketers and producers of natural gas, not from the local distribution companies (Supp. 77-78). The gas was delivered by each seller to the initial receiving pipeline (which in each instance was outside of Ohio); in each instance title to the gas passed outside of Ohio, upon delivery to the initial receiving pipeline (Supp. 65, 109-111). GM then arranged for the transportation of this gas (through separate contracts with interstate pipeline companies and local distribution companies) to its various plants on an as-needed basis.

The Commissioner assessed Ohio use tax on each of GM's purchases of natural gas used during the audit period at the facilities in issue.[11] The Commissioner's representative testified before the BTA that no purchase of natural gas which occurs outside of Ohio can ever qualify for the R.C. 5739.02(B)(7) [19]

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[11] Any natural gas used at the plants "directly in manufacturing" was considered to be excepted from tax by R.C. 5739.01(E)(2). *See* Supp. 13-14.

exemption. (R(I). 55-56).[12] This discrimination is unconstitutional:

> Although the Commerce Clause is phrased merely as a grant of authority to Congress to "regulate Commerce . . . among the several States," Art. I, § 8, cl. 3, it is well established that the Clause also embodies a negative command forbidding the States to discriminate against interstate trade. . . . The Clause prohibits economic protectionism — that is, "regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors."

Associated Industries of Mo. v. Lohman (1994), 114 S. Ct. 1815, 1820 (quoting *New Energy Co. of Indiana v. Limbach* (1988), 486 U.S. 269, 273) (citations omitted). This means that "a State may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State," *Armco, Inc. v. Hardesty* (1984), 467 U.S. 638, 642, nor may a State "discriminate between [20] transactions on the basis of some interstate element." *Boston Stock Exchange v. State Tax Comm'n* (1977), 429 U.S. 318, 332 n.12.

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[12] *See also* Supp. 22 (examination of the Commissioner's designated representative at the hearing below):

> Q. If G.M. purchases natural gas from a person outside the State of Ohio and that natural gas is delivered to General Motors by the seller to someplace outside the State of Ohio. And thereafter, General Motors arranges to have it transported to its facilities in Ohio through the means of some type of transmission company and/or distribution company that operates in Ohio, is there any[] [way] that that gas will qualify for exemption from taxation under 5739.02(B)(7)?
>
> A. Not under that provision, no.
>
> Q. And is that because the seller did not distribute it or transport it to General Motors in Ohio?
>
> A. Through its facilities, that's right.

The Commissioner's construction of R.C. 5727.01(E)(4) and 5739.02(B)(7) results in out-of-State gas sales being taxed while Ohio gas sales are exempted. This is unconstitutional because "no State, consistent with the Commerce Clause, may 'impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business.'" *Maryland v. Louisiana* (1981), 451 U.S. 725, 754 (quoting *Northwestern States Portland Cement Co. v. Minnesota* (1959), 358 U.S. 450, 458).

By definition, a use tax such as Ohio's "appears to violate the Commerce Clause's cardinal rule of nondiscrimination," *Associated Industries*, 114 S. Ct. at 1820-21, because it is imposed only on goods originating outside the State. *See* R.C. 5741.02(C)(1). At the same time, the "compensatory tax doctrine" can save an otherwise discriminatory use tax *only* if the State can show that its use tax on out-of-State commerce compensates for — "but [does] not exceed" — the amount of the sales tax imposed on in-State commerce. *Oregon Waste Sys., Inc.*, 114 S. Ct. at 1352. Here, the Commissioner cannot make the required showing of equal treatment: There is no sales tax on in-State purchases of natural gas, but gas purchased out-of-State and brought into Ohio is subject to use tax. This violates the fundamental Commerce-Clause principle that a "strict rule of equality" for in-State and interstate commerce "is *the* condition precedent for a valid use tax on goods imported from out-of-state." *Halliburton Oil Well Cementing Co. v. Reily* (1963), 373 U.S. 64, 70, 73.

[21] *Halliburton* itself illustrates the unconstitutionality of the Ohio tax scheme as applied to GM. Halliburton manufactured service trucks in Oklahoma, but shipped the trucks to Louisiana for use there. On those trucks, Louisiana imposed a 2% use tax, defined as "the *cost price* of each item or article of tangible personal property when the same is not sold but is used . . . in this state." *Id.* at 65-66 (emphasis added). Louisiana's 2% sales tax, in contrast, was imposed on "the *sales price* of each item or article of tangible personal property when sold at retail in this state." *Id.* at 65 (emphasis added). The difference between

Louisiana's sales and use taxes was that "overhead" was deductible from the *sales* tax base, but not from the *use* tax base.[13] Thus, Halliburton was not allowed to deduct "overhead" from its use tax base — even though "overhead" would have been deductible if the trucks had been made and sold in Louisiana. *Id.* at 67.

The United States Supreme Court held that allowing the "overhead" deduction only for in-State *sales* taxes, but not for *use* taxes on goods purchased out-of-State, discriminated against interstate commerce and therefore violated the "strict rule of equality adopted in *Silas Mason*.[14] *Id.* at 73. See also *Maryland v. Louisiana* (1981), 451 U.S. at 759 (the "common thread running through the cases upholding compensatory taxes is the equality of treatment between local and interstate commerce"). Moreover, the Court noted that in applying this "strict rule," "equality . . . is measured in dollars and cents, not legal abstractions." *Id.* at 70. The absence of a deduction for out-of-State manufacturer-users resulted in over $1.5 million in

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[13] This was because the Louisiana use tax was assessed on the "cost price" of the item, defined as the actual cost *without deductions* on account of "labor or service costs, . . . or any other expenses whatsoever." *Id.* (quoting La. Rev. Stat. Ann. § 47:301(3)) (internal quotation marks omitted). In contrast, the Louisiana sales tax was assessed on the "sales price," which did allow such deductions.

[14] *Henneford v. Silas Mason Co.* (1937), 300 U.S. 577, held that a use tax on solely out-of-state goods will avoid Commerce-Clause difficulties if and only if,

> [w]hen the account is made up, the stranger from afar is subject to no greater burdens . . . than the dweller within the gates. The one pays upon one activity or incident, and the other upon another, but the sum is the same when the reckoning is closed.

Id. at 584. As the Supreme Court has more recently explained, this "strict rule of equality" means that "the burdens imposed on interstate and intrastate commerce must be equal." *Associated Industries of Mo. v. Lohman* (1994), 114 S. Ct. 1815, 1821.

additional taxes for Halliburton — a "clearly substantial" tax inequality.' *Id.* at 71.[15]

No Supreme Court case after *Halliburton* has ever strayed from "the rule of strict equality" for sales and use taxes. Rather, the Court has repeatedly forbidden the use of similar discriminatory tax exemptions. For instance, *Maryland v. Louisiana*, *supra*, involved Louisiana's "first-use" severance tax, which was imposed on natural gas initially "dried" in Louisiana, but ultimately shipped (98% of it) out of State. [23] Louisiana granted a series of "Severance Tax Credits" and exclusions, which essentially rebated the first-use tax — but to in-State producers and distributors only. The Court struck the tax down as violative of the Commerce Clause, since it "unquestionably discriminate[d] against interstate commerce in favor of local interests as the necessary result of various tax credits and exclusions." *Id.* at 756.

And just this last term, in *Associated Industries of Mo. v. Lohman*, *supra*, the Supreme Court again affirmed that "strict equality," not "close enough for government work," is the rule for sales and use taxes. In *Associated Industries*, Missouri imposed an "additional use tax" which was purportedly designed to "compensate" for the sales taxes imposed by localities (Missouri, like Ohio, has a uniform 4% state sales tax, but allows counties and municipalities to impose additional sales taxes on top of the state sales tax). As a result of the widely varying sales tax rates, the use tax exceeds the local sales tax in 53.5% of the local jurisdictions. *Id.* at 1820. The Court held that the "strict rule of equality" rendered Missouri's use tax unconstitutional in those

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[15] Interestingly, the Court in *Halliburton* noted that a similar Ohio tax was saved from unconstitutionality because, by administrative regulation, it had "rejected the Louisiana position" and "excluded labor and shop overhead from the tax base of the out-of-state manufacturer-user" as well as the in-State manufacturer-user, "on the ground that its inclusion might violate the Commerce Clause." *Halliburton*, 373 U.S. at 75 & n.10.

53.5% of jurisdictions where the tax on out-of-State sales was greater than that on in-State sales:

> Missouri's use tax scheme, however, runs afoul of the basic requirement that, for a tax system to be "compensatory," the burdens imposed on interstate and intrastate commerce must be equal. As we observed in *Maryland v. Louisiana*, the "common thread running through the cases upholding compensatory taxes is the equality of treatment between local and interstate commerce." 451 U.S., at 759. See also *Halliburton*, *supra*, at 70 ("[E]qual treatment for in-state and out-of-state taxpayers similarly situated is the condition precedent for a valid use tax on goods imported from out-of-state").
>
> [24] Where a State imposes equivalent sales and use taxes, we have upheld the system under the Commerce Clause. See *Silas Mason*, *supra*, at 584-587. But in Missouri, whether the 1.5% use tax is equal to (or lower than) the local sales tax is a matter of fortuity, depending entirely upon the locality in which the Missouri purchaser happens to reside. Where the use tax exceeds the sales tax, the discrepancy imposes a discriminatory burden on interstate commerce. Out-of-state goods brought into such a jurisdiction are subjected to a higher levy than are goods sold locally. The resulting disparity is incompatible with what we have termed the "strict rule of equality adopted in *Silas Mason*." *Halliburton*, *supra*, at 73.

Id. at 1821. The Court agreed with the dissenting Chief Justice of Missouri that "a rule of 'close enough for government work'" never took root in our commerce Clause jurisprudence." *Id.* at 1823.

In other cases, too, the Court has been equally vigilant in striking down other supposedly "compensatory" use taxes which violate — even ever so slightly — the rule of "strict equality." *See*, e.g., *Oregon Waste Systems, Inc. v. Department of Environmental Quality*, *supra*, 114 S. Ct. at 1352; *Tyler Pipe Indus., Inc. v. Washington State Dep't of Revenue* (1987), 483

U.S. 232, 243-44 ("The exemption . . . affirmatively places interstate commerce at a disadvantage" and violates the Commerce Clause); *Armco, Inc. v. Hardesty*, *supra*, 467 U.S. at 642-43 (exemption of local manufacturers from West Virginia's gross receipts tax violated Commerce Clause); *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. at 331 ("Equal treatment of interstate commerce . . . has been the common theme running through [25] the cases in which this Court has sustained 'compensating,' state use taxes.").[16] *See also American Modulars Corp. v. Lindley* (1978), 54 Ohio St. 2d 273, 376 N.E.2d 575, *cert. denied* (1978), 439 U.S. 911.

Ohio's scheme of imposing use tax on out-of-State natural gas purchases, while exempting in-State purchases from sales tax, plainly violates the oft-affirmed rule of "strict equality." The Commissioner's view, that a seller must deliver the gas to the buyer *in Ohio* to qualify for the exemption, means that only gas sold in Ohio qualifies for the exemption: As the Commissioner's representative himself admitted (Supp. 25), an otherwise-identical, out-of-State sale of natural gas can never qualify for the exemption. This application of Ohio law could encourage consumers who need natural gas for heating or power purposes in Ohio to purchase natural gas in-State to enjoy a significant tax savings. Clearly, this application runs afoul of the central tenet

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[16] Although it did not involve a use tax, *Bacchus Imports, Ltd. v. Dias* (1984), 468 U.S. 263, also holds that such discriminatory tax exemptions are unconstitutional. *Bacchus* involved a 20% excise tax on all liquor sales, coupled with an exemption for pineapple wine manufactured in Hawaii and for okolehao, a brandy distilled from the root of a shrub indigenous to Hawaii. The Court held that Hawaii's law was unconstitutional because it "had both the purpose and effect of discriminating in favor of local products." *Id.* at 273. "By granting a tax exemption for local products [in *Bacchus*], Hawaii in effect created a protective tariff. Goods produced out of State were taxed, but those produced in State were subject to no net tax." *West Lynn Creamery, Inc. v. Healy* (1994), 114 S.Ct. ____, ____ (*slip op.*, at 10) (discussing *Bacchus*).

of the Commerce Clause — that such "preferential trade areas [are] destructive of the very purpose of the Commerce Clause." *Dean Milk Co. v. Madison* (1951), 340 U.S. 349, 356. *See also American Trucking Ass'n v. Scheiner* (1987), [26] 483 U.S. 266, 268-87 (tax invalidated because it "exert[ed] an inexorable hydraulic pressure" for truckers "to ply their trade within the State that enacted the measure").

Moreover, when "measured in dollars and cents," a "clearly substantial" tax inequality results. By purchasing the natural gas at issue from out-of-State natural gas companies, instead of from a similarly situated in-State company, GM was assessed $274,560.82 of tax that would not have been assessed had GM purchased the gas in Ohio. This extra tax burden on interstate commerce, like the extra tax burden in *Halliburton*, is "clearly substantial" and violates the Commerce Clause.

For use tax such as the one involved here, the controlling rule is "the strict rule of equality." *Halliburton*, 373 U.S. at 73. The Commissioner's limiting of the "natural gas company" exemption in 5739.02(B)(7) to in-State sales violates that rule. As applied to GM, therefore, the Ohio use tax violates the Commerce Clause of the United States Constitution. Accordingly, the Court should reverse the decisions of the BTA and remand these cases to the Commissioner with instructions to vacate the assessments.

SUPREME COURT OF OHIO

GENERAL MOTORS CORPORATION,

Appellant,

v.

TRACY, Tax Commr.,

Appellee

Nos. 94-642, 94-643 and 94-644.

Decided Aug. 9, 1995.

(Found in the Appendix to the Petition for Certiorari at 1a-5a.)

THE SUPREME COURT OF OHIO

1995 TERM

To wit: October 4, 1995

General Motors Corporation	:	
Packard Electric Division	:	Case Nos. 94-642,
Appellant	:	94-643, 94-644
v.	:	RECONSIDERATION
	:	ENTRY
Roger W. Tracy, Tax	:	
Commissioner of Ohio,	:	(Board of Tax Appeals)
Appellee.	:	

(Found in the Appendix to the Petition for Certiorari at 26a-28a.)

IN THE SUPREME COURT
OF THE UNITED STATES

[Caption Omitted in Printing]

Order Granting Petition for a Writ of Certiorari entered on April 1, 1996

Supreme Court, U.S.
FILED
MAY 16 1996
CLERK

No. 95-1232

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

GENERAL MOTORS CORPORATION,

Petitioner,

v.

ROGER W. TRACY, TAX COMMISSIONER OF OHIO,

Respondent.

On Writ of Certiorari to the Supreme Court of Ohio

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Does Ohio's use tax, which exempts gas purchased from local public utilities while taxing gas purchased out-of-State, discriminate against interstate commerce in violation of the Commerce Clause?

2. Does a purchaser of natural gas — which pays the use tax — have standing under the Commerce Clause to challenge such a use tax either in its own right or as a representative of vendors?

3. Does Ohio's discriminatory use tax violate the Equal Protection Clause?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the Ohio Supreme Court were General Motors Corporation and Roger W. Tracy, Tax Commissioner of Ohio.

Pursuant to Supreme Court Rule 29.6, Petitioner General Motors Corporation states that it has no parent companies. General Motors has several nonwholly owned subsidiaries, which are set forth in the Appendix to General Motors' petition for certiorari at pages 29a-35a.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Supreme Court of Ohio (Pet. App. 1a-5a)[1] is reported at 652 N.E.2d 188. The orders of the Supreme Court of Ohio denying reconsideration (Pet. App. 26a-28a) are reported at 655 N.E.2d 188. The relevant orders of the Ohio Board of Tax Appeals (Pet. App. 6a-19a) and Tax Commissioner of Ohio (Pet. App. 20a-25a) are unreported.

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on August 9, 1995. A timely petition for reconsideration in that court was denied on October 4, 1995. On December 19, 1995, Justice Stevens extended the time for filing a petition for certiorari to and including February 1, 1996. The petition for a writ of certiorari was filed on February 1, 1996, and granted on April 1, 1996. This Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Commerce Clause of Article I, section 8 to the United States Constitution provides:

> The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides:

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[1] The following abbreviations are used throughout this brief: References to "Pet. App. ___" refer to the appendix to GM's petition for certiorari; references to "Pet. Opp. ___" refer to the respondent's brief in opposition to GM's petition; references to "J.A. ___" are to the Joint Appendix, which has been filed concurrently with this Court; and references to "Supp. ___" are to the Supplement (*i.e.*, the record on appeal) which was filed in the Ohio Supreme Court.

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

Pertinent provisions of the Ohio Revised Code are set out in an appendix to this brief.

STATEMENT

This case involves Commerce Clause and Equal Protection Clause challenges to Ohio's sales and use tax scheme, which exempts from tax natural gas purchased from Ohio-based public utilities but taxes purchases from all out-of-state suppliers.

The Natural Gas Market. A purchaser of natural gas has essentially two choices of suppliers: (1) producers or marketers of natural gas, or (2) local distribution companies (local public utilities). As the Commissioner has previously explained, "[t]he players in the business of selling natural gas are natural gas marketers and natural gas utilities." Pet. Opp. 11. Producers of natural gas, most of whom are concentrated in the southwestern United States, extract the gas from underground reservoirs; marketers, as the name implies, market producers' gas. Local distribution companies (also known as LDCs) are local public utilities, such as The East Ohio Gas Company or Columbia Gas of Ohio, Inc. J.A. 100, 151-52, 157-58.

Until the last dozen years or so, interstate pipeline companies and local public utilities were barred from serving as common carriers of natural gas for producers and marketers. J.A. 203. As a consequence, producers almost never sold gas directly to consumers (the "burner-tip" market). J.A. 126. Rather, producers' gas was most often sold in the first instance to interstate pipeline companies, which transported and sold gas to public utilities. In turn, the utilities eventually sold the gas to the end user.[2]

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[2] *See* Breyer & MacAvoy, *The Natural Gas Shortage and the Regulation of Natural Gas Producers*, 86 Harv. L. Rev. 941, 944 (1973).

However, this prohibition on common carriage was lifted in the mid-1980's, first in Ohio with respect to local distribution, as a partial solution to natural gas shortages, and later, on the national level, with respect to interstate distribution, as part of the massive deregulation of the natural gas industry which occurred in the 1980s. J.A. 126, 193-94.[3] On the national level, deregulation began in earnest in 1986, when the Federal Energy Regulatory Commission (FERC), through its Order No. 436, lifted restrictions which, thereafter, allowed industrial buyers to negotiate their own contracts for natural gas.[4] The hallmark of Order No. 436 was its mandate of open access to interstate pipeline systems on a nondiscriminatory basis.[5] Order No. 436 was followed in 1992 by FERC Order No. 636, which continued the process of deregulation by requiring interstate pipelines to "unbundle" their gas-gathering operations and costs from their other operations and costs (*e.g.*, transportation). FERC's clear intent was to allow the "public [to] realize the full benefits of the competition at the wellhead," and to "create a regulatory environment in which no gas seller has a competitive advantage over another gas seller."[6]

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[3] *See generally* Pierce, *Natural Gas Regulation, Deregulation, and Contracts*, 68 Va. L. Rev. 63 (1982).

[4] Order No. 436, Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, 50 Fed. Reg. 42,408 (1985) (codified in scattered sections of 18 C.F.R.), *aff'd in part and vacated in part, Associated Gas Distribs. v. FERC*, 824 F.2d 981 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988), *on remand*, Order No. 500, 52 Fed. Reg. 30,334 (1987).

[5] *See Northern Natural Gas Co.*, 48 F.E.R.C. (CCH) ¶ 61,232, at ¶ 61,828-29 (1989); *see also Associated Gas Distribs.*, 824 F.2d at 993-94.

[6] Order No. 636, Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, 57 Fed. Reg. 13,267, 13,269 (1992).

One of the principal results of this deregulation was that all users and producers of natural gas — intrastate pipelines, local public utilities, and large end users — could employ interstate pipelines to transport gas from any supplier. Thus, interstate pipelines, once major merchants of natural gas, were removed from their traditional "middleman" role and now "operate almost exclusively as common carrier transporters."[7]

Such regulatory changes have allowed producers and marketers of natural gas to complete directly with local public utilities for sales of natural gas to burner-tip consumers. J.A. 203. Since entering the burner-tip market, producers and marketers of natural gas have been enormously successful. One of the principal reasons for this success is that, even with transportation costs, producers and marketers are able to sell at lower costs than local public utilities. J.A. 157, 194.[8] One marketer who testified before the Ohio Board of Tax Appeals in this action estimated that this manner of selling natural gas has grown from virtually zero in the early 1980s to "probably 80 or 90 percent of the gas that's consumed by industrial users" like General Motors ("GM"). J.A. 194.

General Motors' Activities. General Motors Corporation purchases natural gas used for power and heating purposes in its plants in Ohio. Since 1984, GM has bought natural gas directly from producers and marketers of natural gas outside of Ohio, arranging for its own transportation through interstate pipelines and local public utilities. J.A. 146. During the tax period in issue (January 1, 1987 through June 30, 1990), GM's Ohio plants purchased most of their natural gas requirements directly from out-of-state producers or marketers rather than buying gas from the Ohio-based public utilities which served its Ohio plants. J.A.

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[7] Fagan, *From Regulation to Deregulation: The Diminishing Role of the Small Consumer Within the Natural Gas Industry*, 29 Tulsa L. J. 707, 710 & n.6 (1994).

[8] *See also* Fritsch, *Tired of Phone Wars? Get Ready for a Fight To Sell Natural Gas*, Wall St. J., April 16, 1996, at A1.

156. GM purchased this gas from several sellers, including Mobil Natural Gas, Inc. (a wholly owned subsidiary of Mobil Oil Corporation), Yankee Resources, Inc. (now known as Access Energy Corporation), Rocky Mountain Energy Exchange, and Wellhead Enterprises, Inc. *See* J.A. 16-57; Supp. 227-611.

Under these contracts, GM acquired title to the gas at the point that the seller delivered the gas to the initial receiving pipeline; all of these delivery points were outside of Ohio. Pet. App. 1a. Under GM's contracts with Mobil Natural Gas, GM acquired the gas in Oklahoma, Louisiana and Texas. J.A. 30, 41-45; Supp. 250, 269-71, 282-85, 393, 416, 463, 483-91. Under GM's contract with Yankee Resources, GM acquired the gas in Texas and Louisiana. Supp. 514, 527-28. Under GM's contract with Rocky Mountain Energy Exchange, GM acquired the gas in Texas. Supp. 538, 549. And under GM's contract with Wellhead Enterprises, GM acquired the gas in Kansas, Louisiana, and Oklahoma. Supp. 580, 593-94, 599, 604, 607, 610. The producer or marketer delivered the gas to interstate pipeline companies in Texas, Oklahoma, Kansas or Louisiana, and GM then contracted with interstate pipeline companies and, ultimately, local public utilities in Ohio (The East Ohio Gas Company, in particular) for common carrier transportation of the gas through pipelines to GM's plants. *See* Pet. App. 1a. GM purchased from these out-of-state sources because they offered lower prices than the in-state utilities. J.A. 157; Supp. 202.

The Ohio Statutory Scheme. The state of Ohio imposes a 5-7% sales tax on goods purchased in Ohio, including natural gas. The state rate is 5%; local jurisdictions are permitted to levy an additional tax up to 2%, which is collected by the state. *See* Ohio Rev. Code Ann. §§ 5739.02, 5739.025. Similarly, the state imposes a 5-7% use tax on goods, including natural gas, purchased outside of Ohio but used in Ohio. *See* Ohio Rev. Code Ann. §§ 5739.025, 5741.02(A). Both the sales tax and the use tax are imposed on the purchaser. *See* Ohio Rev. Code Ann. §§ 5739.03, 5741.02. However, natural gas purchased from a "natural gas company" is exempted from sales tax. *See* Ohio

Rev. Code Ann. § 5739.02(B)(7).[9] Under the Ohio code, "[a]ny person . . . [i]s a natural gas company when engaged in the business of supplying natural gas for lighting, power, or heating purposes to consumers within this state." Ohio Rev. Code Ann. § 5727.01(D)(4).

As discussed below, the Ohio Supreme Court construed the Ohio Rev. Code Ann. § 5727.01(D)(4) definition of "natural gas company" to be limited to companies that "own or operate the transportation and distribution equipment and deliver the natural gas to consumers in Ohio." Pet. App. 3a. *See also Chrysler Corp. v. Tracy*, 652 N.E.2d 185, 187 (Ohio 1995). In other words, only purchases from Ohio public utilities are exempt from sales or use tax. The taxability of the sale or purchase thus depends not on the character of the seller as a public utility, but on whether the seller owns distribution equipment or facilities within the state and used such equipment or facilities to deliver the gas to the consumer. The consequence of the use tax exemption for Ohio public utilities is that they enjoy a 5-7% advantage over out-of-state producers and distributors of gas, and the purchasers from out-of-state sources suffer a similar disadvantage.

The Tax Commissioner's Assessment. For the audit period at issue here (October 1, 1986 to June 30, 1990), the Ohio Tax Commissioner assessed Ohio use tax upon GM's purchases of natural gas, with a minor exception not relevant to this case. Pet. App. 24a.[10]

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[9] Under Ohio law, sales and use tax does not apply to

> [s]ales of natural gas by a natural gas company . . . if [it] is delivered to consumers through . . . pipes, or conduits, . . . all terms as defined in section 5727.01 of the Revised Code.

Ohio Rev. Code Ann. § 5739.02(B)(7).

[10] That exception was for natural gas consumed at GM's plants directly in manufacturing tangible personal property for sales, which was exempt from tax under Ohio Rev. Code Ann. § 5739.01(E)(2)(now § 5739.011).

Proceedings Before The Board of Tax Appeals. GM appealed the Commissioner's final determination to Ohio's Board of Tax Appeals ("BTA"). On February 25, 1994, the BTA affirmed the Commissioner's denial of the claimed exemption. Pet. App. 6a-19a.

The BTA first held that GM's purchases were subject to tax under the statute. It held that the out-of-state "marketers and/or producers of gas" who sold the gas in question were not "natural gas companies" under Ohio Rev. Code Ann. § 5727.01. Pet. App. 10a, 13a. The BTA found "dispositive" its then-recent prior decision in *Chrysler Corp. v. Tracy*, B.T.A. Case No. 91-K-1523 (Jan. 21, 1994), in which the BTA

> concluded that a broker or marketer of natural gas, which did not produce natural gas, did not have the physical capabilities to transport natural gas to its customers, and which was not subject to regulation as a public utility, did not qualify as a "natural gas company" as that term is defined in R.C. 5727.01.

Pet. App. 13a (footnote omitted). Thus, under the BTA's construction of the statute, GM was not entitled to the use tax exemption because it was not purchasing its gas from a local public utility.

The BTA also rejected GM's "constitutional challenges with respect to the Tax Commissioner's application of a statute to a given set of facts," despite recognizing that under Ohio law the BTA "is without jurisdiction to determine the constitutional validity of a given statute." Pet. App. 15a.[11] It concluded that GM had not shown that application of the statute to GM's practices was unconstitutional. Pet. App. 15a-16a.

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[11] Under Ohio law, "the BTA receives facts but cannot rule on the [constitutional] question[s]." *MCI Telecommunications Corp. v. Limbach*, 625 N.E.2d 597, 599 (Ohio), *cert. denied*, 115 S. Ct. 77 (1994).

Proceedings Before The Ohio Supreme Court. GM appealed the BTA's decision to the Supreme Court of Ohio. In addition to again urging its statutory argument, GM argued that under the interpretation of "natural gas company" advanced by the Commissioner and adopted by the BTA, the use tax exemption was unconstitutional under the Commerce and Equal Protection Clauses of the United States Constitution. GM noted that the BTA's construction, which limited the definition of "natural gas companies" to companies having "the physical capabilities to transport natural gas to its customers," effectively limited the exemption to purchases from local public utilities while taxing all out-of-state purchases. As a result of this unconstitutional discrimination, GM argued, it was deprived of the use tax exemption and paid higher taxes as a result.

The Ohio Supreme Court's Decision. On August 9, 1995, the Ohio Supreme Court affirmed the Board of Tax Appeals. Based on its decision in *Chrysler Corp. v. Tracy*, 652 N.E.2d 185, decided that same day, the court rejected GM's statutory argument, holding that GM's vendors were not "natural gas companies" because they did not own distribution facilities within the state and did not deliver gas to customers in Ohio. Pet. App. 2a, 3a.

The court also rejected GM's Commerce Clause argument on two grounds. First, the court saw no impermissible discrimination in exempting only purchases from Ohio public utilities, since some in-state sellers — independent marketers of gas within Ohio — were also subject to tax:

> We have before us purchases by GM of natural gas from a company that does not own any production, transportation, or distribution equipment. The commissioner claims that he would tax purchases from these persons whether they sold natural gas in-state or out-of-state. Thus, the commissioner's application of the statute does not benefit in-state purchasers by favoring in-state vendors over out-of-state vendors; he treats purchases from both the same.

Pet. App. 4a.

Second, the court held that "on close inspection," GM was arguing that the application of the exemption statute "burdens out-of-state vendors of natural gas." *Id.* However, the court held that GM "lacks standing" to make this claim because it was not "a member of that class" of out-of-state vendors. *Id.*

The supreme court also rejected GM's Equal Protection challenge, which it viewed as "submerged in [GM's] Commerce Clause argument." *Id.*

GM moved for reconsideration in the Ohio Supreme Court. Reconsideration was denied on October 4, 1995. Pet. App. 26a-28a. This Court granted GM's petition for certiorari on April 1, 1996. J.A. 270.

SUMMARY OF ARGUMENT

"No state, consistent with the Commerce Clause, may 'impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business.'" *Boston Stock Exchange v. State Tax Comm'n,* 429 U.S. 318, 329 (1977) (*quoting Northwestern States Portland Cement Co. v. Minnesota,* 358 U.S. 450, 457 (1959)). Ohio's scheme of taxing out-of-state purchases of natural gas, while exempting purchases made from Ohio's own competing public utilities, violates this longstanding Commerce Clause principle.

Ohio's efforts to justify this discrimination against interstate commerce are untenable. The court below justified the discrimination on the basis that some in-state purchases of natural gas (from in-state producers and marketers) were also being denied the exemption; yet, at least since *Brimmer v. Rebman,* 138 U.S. 78 (1891), this Court has repeatedly rejected such justifications. *See C & A Carbone, Inc. v. Town of Clarkstown,* 114 S. Ct. 1677 (1994); *Fort Gratiot Sanitary Landfill v. Michigan Department of Natural Resources,* 504 U.S. 353 (1992); *Polar Ice Cream and Creamery Co. v. Andrews,* 375 U.S. 361 (1964); *Dean Milk Co. v. City of Madison,* 340 U.S. 349 (1951).

Nor could the sales and use tax on natural gas seriously be justified as "compensatory" for the tax which Ohio imposes on the gross receipts of its public utilities. The two taxes are imposed on different entities (the former, on the purchaser of gas; the latter, on the utilities), and the sales and use tax (5-7%) is higher than the gross receipts tax (4.75%). That justification would fail the compensatory tax test as most recently explained by this Court in *Fulton Corp. v. Faulkner*, 116 S. Ct. 848, 855-60 (1996).

Similarly, there is no merit to Ohio's efforts to justify the discrimination on the theory that Ohio has an interest in favoring its public utilities. This Court has uniformly struck down states' efforts to favor local businesses over other businesses dealing in interstate commerce, *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, or to favor goods purchased locally over goods purchased in other states. *Associated Industries of Mo. v. Lohman*, 114 S. Ct. 1815 (1994); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984). Discrimination based on the means of delivery of out-of-state goods, whether by common carrier or by the seller's own distribution system, is also impermissible. For example, in a long line of cases, this Court has held that a state may not discriminate between sales by mail or common carrier and sales at retail. *E.g.*, *Associated Industries of Mo. v. Lohman*, 114 S. Ct. 1815. If this Court were to uphold Ohio's discriminatory treatment, states could discriminate against interstate commerce in a wide variety of situations.

The Ohio Supreme Court's apparent holding that GM lacked standing to challenge the discriminatory tax, because GM was not itself an out-of-state seller of natural gas, was also contrary to well-established law. The Commerce Clause prohibits discrimination against out-of-state goods as well as out-of-state taxpayers; in recognition of that principle, taxpayers who pay discriminatory taxes on out-of-state goods (such as GM), have uniformly been recognized to have standing to raise Commerce Clause challenges. And even if it could be said that GM was not raising its own Commerce Clause rights, but the rights of its out-of-state vendors,

GM would still have standing under this Court's *jus tertii* precedents.

Lastly, contrary to the holding of the court below, the discrimination also independently violates the Equal Protection Clause. Since the distinction which Ohio has drawn has an adverse impact on interstate commerce, heightened scrutiny would be appropriate. Under any level of scrutiny, however, the distinction could not pass muster under the Equal Protection Clause.

ARGUMENT

The Supreme Court of Ohio held in this case that a state may constitutionally provide an exemption from sales tax for purchases of natural gas from an in-state, local public utility, even though purchases of identical gas from any competitors outside of Ohio are never exempted from Ohio's complementary use tax. This holding is not consistent with either the Commerce Clause or the Equal Protection Clause.

I. THE OHIO SUPREME COURT'S HOLDING, THAT THE TAX IS CONSTITUTIONAL BECAUSE IT ALSO BURDENS SOME IN-STATE PURCHASES, IS UNTENABLE UNDER THE COMMERCE CLAUSE

This Court has long recognized that the Constitution "was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935).[12] "The few simple words of the Commerce Clause" were the Framers' principal mechanism for ensuring that "the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation" would

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[12] Or, as Benjamin Franklin reputedly warned, "we must . . . all hang together, or most assuredly we shall all hang separately." R. Clark, *Benjamin Franklin* 286 (1983).

not be repeated under our current Constitution. *Hughes v. Oklahoma*, 441 U.S. 322, 325-26 (1979). Here, however, the Ohio taxing scheme implements precisely the "economic Balkanization" which this Court has long held unconstitutional — Ohio taxes out-of-state natural gas, but exempts gas purchased from its own public utilities. This system of taxation creates a preference for gas sold by an Ohio public utility — and, correspondingly, it creates a disincentive to purchase gas from any other source, including *all* out-of-state sources.

A. The Discriminatory Tax Cannot Be Saved Because It Also Discriminates Against Some In-State Commerce

In *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963), this Court held that when a state provides an exemption from sales tax, it must provide a strictly equal exemption from use tax for the same goods when purchased outside the state. *Id.* at 73. In taxing sales made by out-of-state sellers, a state thus must follow a "strict rule of equality" (*id.*), meaning that the use tax on goods purchased out-of-state may never exceed the sales tax on in-state sales. *Associated Indus. of Mo. v. Lohman*, 114 S. Ct. 1815, 1821 (1994). Here, however, the decision of the Ohio Supreme Court sanctioned the exemption from sales tax of in-state purchases of natural gas from local public utilities while out-of-state purchases were subjected to a use tax. This favoritism violates the Commerce Clause.

The Ohio Supreme Court, however, held that there was no discrimination here because in-state non-utility sellers were also subject to sales or use tax. This Court's cases hold uniformly to the contrary. In the seminal case of *Brimmer v. Rebman*, 138 U.S. 78 (1891), this Court established the proposition that a tax which discriminates against interstate commerce cannot be saved from unconstitutionality simply because it also disfavors a portion of in-state commerce. The Court in *Brimmer* held that a Virginia tax, which was imposed on meat slaughtered 100 miles or more from the place of sale, impermissibly discriminated against interstate commerce. The tax applied equally to sales of meat from animals which had been slaughtered in Virginia and

thereafter transported 100 or more miles within Virginia as well as to sales of meat from animals slaughtered in another state and transported 100 or more miles into Virginia. *See* 138 U.S. at 81-83. As the Court explained, it was immaterial that the taxing statute also disfavored some local commerce:

> The fees exacted, under the Virginia statute, for the inspection of beef, veal and mutton, the product of animals slaughtered one hundred miles or more from the place of sale, are, in reality, a tax; . . . . *Nor can this statute be brought into harmony with the Constitution by the circumstance that it purports to apply alike to the citizens of all the states, including Virginia*; for, "a burden imposed by a State upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the States, including the people of the State enacting such statute." *Minnesota v. Barber*, [136 U.S. 313, 326 (1890)]; *Robbins v. Shelby Taxing District*, 120 U.S. 489, 497 [(1887)].

Id. at 82-83 (emphasis added).

The rule of *Brimmer* has consistently been recognized and applied by this Court. *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951), invalidated a Madison, Wisconsin ordinance which forbade the sale of pasteurized milk in that city unless it had been pasteurized and bottled at an approved pasteurization plant "within a radius of five miles from the central portion of the City of Madison otherwise known as the Capitol Square." *Id.* at 350 & n.1 (internal quotations omitted). Like the statute at issue in this case, the Madison ordinance burdened *all* out-of-state product, and also burdened *some* in-state product. But that did not keep the ordinance from violating the Commerce Clause:

> It is immaterial that Wisconsin milk from outside the Madison area is subjected to the same proscription as that moving in interstate commerce.

Id. at 354 n.4.

So too, in *Polar Ice Cream and Creamery Co. v. Andrews*, 375 U.S. 361 (1964), this Court unanimously held that a Florida statute (and regulations thereunder), which required a local milk processor and distributor to purchase to the extent possible all of its Class I milk requirements at a fixed price from producers located within a four-county marketing area, imposed an impermissible burden on interstate commerce. Even though producers from all of Florida's other counties were as disadvantaged as out-of-state producers, the Court unanimously held that the statute constituted an unconstitutional "embargo on out-of-state milk." *Id.* at 378.

Four Terms ago, this Court again applied the rule of *Brimmer* to strike down a Michigan law prohibiting landfill operators from accepting solid waste which originated outside the county of the landfill. *Fort Gratiot Sanitary Landfill v. Michigan Department of Natural Resources*, 504 U.S. 353 (1992). This Court, relying upon *Brimmer* and *Dean Milk*, held that Michigan's law, which favored only the small amount of in-state waste originating in the particular county, while disfavoring *all* out-of-state waste and *most* in-state waste, still violated the Commerce Clause. *Id.* at 361-63.

Even more recently, this Court applied the same rule to strike down a Clarkstown, New York, ordinance requiring that all solid waste be processed at that town's local transfer station before leaving the municipality. *C & A Carbone, Inc. v. Town of Clarkstown*, 114 S. Ct. 1677, 1682 (1994). Relying expressly on *Dean Milk* and *Fort Gratiot*, this Court held that "the flow control ordinance discriminates, for it allows only the favored operator to process waste that is within the limits of the town. The ordinance is no less discriminatory because in-state or in-town processors are also covered by the prohibition." *Id.*

The same rule has been applied to strike down discriminatory state taxes where the discrimination favored only some local products. In *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), this Court considered a Hawaii sales tax which taxed all sales of liquor at wholesale, but exempted from the tax okolehao

(a brandy produced from a root native only to Hawaii) and pineapple wine. Other locally produced liquors, such as "sake and fruit liqueurs [were] not exempted from the tax." *Id.* at 265. This Court held the discriminatory exemption violative of the Commerce Clause, despite the fact that the exemption was also denied to some in-state liquors. "[T]he effect of the exemption is clearly discriminatory, in that it applies only to locally produced beverages, even though it does not apply to all such products." *Id.* at 271. The same is true of the Ohio exemption: it "applies only to locally-[sold gas], even though it does not apply to all such products."

Associated Industries of Mo. v. Lohman, 114 S. Ct. 1815, like *Bacchus,* also confirms the proposition that a tax which is only partial in its favoritism for in-state commerce is still unconstitutional. In *Associated Industries,* this Court struck down Missouri's use-tax scheme, which allowed local governments to impose their own sales taxes on top of the state-imposed sales and use taxes. In some Missouri counties, but not in all, the combined state and local use tax on out-of-state sales exceeded the state and local sales tax on in-state sales. This was unconstitutional because it violated the "strict rule of equality" articulated in *Halliburton,* 373 U.S. at 73. The tax was no less unconstitutional because the discrimination was isolated in certain counties and not statewide, or because, in some counties, in-state goods were actually subject to *higher* taxes than out-of-state goods.

In short, it is well established that, under the Commerce Clause, "[a] government cannot validate discrimination against a protected class . . . simply by subjecting some members of the nonprotected class to the same burden." Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause,* 84 Mich. L. Rev. 1091, 1230 (1986). The Ohio exemption scheme is fundamentally inconsistent with this established principle.

This Court has adopted a similar analysis under the Interstate Privileges and Immunities Clause of Article IV, § 2 of the

Constitution.[13] In *United Building & Construction Trades Council v. Mayor and Council of the City of Camden*, 465 U.S. 208 (1984), the Court held that a Camden, New Jersey ordinance, which required that 40% or more of the employees of contractors and subcontractors working on City projects be City residents, was invalid under the Privileges and Immunities Clause, even though New Jersey citizens not residing in Camden were also discriminated against. *See id.* at 217, 221-23. The Court noted that such a "blanket exemption for all classifications that are less than statewide would provide States with a simple means for evading the strictures of the Privileges and Immunities Clause," and "would effectively write the Clause out of the Constitution." *Id.* at 217-18 n.9. Even Justice Blackmun, who urged that the ordinance was valid under the Privileges and Immunities Clause because it applied to some in-state residents as well as out-of-state residents, agreed that such discrimination would be invalid under the Commerce Clause, because the national marketplace ensured by the Commerce Clause "is impermissibly undermined by local protectionism even when intrastate commerce is penalized as well." *Id.* at 235 n.16 (Blackmun, J., dissenting) (citing *Dean Milk Co. v. Madison*, 340 U.S. at 354 & n.4).

The taxing provisions at issue here are indistinguishable in principle from those state laws invalidated in *Brimmer, Dean Milk, Polar Ice Cream, Fort Gratiot, C & A Carbone, Bacchus*, and *Associated Industries*. Ohio has drawn the very line (favoring some in-state commerce while disfavoring all out-of-state commerce) which this Court has so often found impermissible. Were such discrimination permissible, states would be provided with a simple means for evading the strictures of the Commerce Clause by favoring some but not all in-state commerce. *Brimmer*,

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[13] The Privileges and Immunities Clause and the Commerce Clause possess a "shared vision of federalism." *Hicklin v. Orbeck*, 437 U.S. 518, 531-32 (1978). This "shared vision of federalism" no doubt derives from the two clauses' common origin in the fourth Article of Confederation. *Baldwin v. Fish & Game Comm'n*, 436 U.S. 371, 379-80 (1978); *Austin v. New Hampshire*, 420 U.S. 656, 660 (1975).

138 U.S. at 83; *C & A Carbone*, 114 S. Ct. at 1682; *cf. United Building & Construction Trades Council v. Mayor and Council of the City of Camden*, 465 U.S. at 217-18 n.9. The preferential treatment of natural gas sales by local public utilities is invalid.

B. The Discrimination Cannot Be Justified On The Theory That The Use Tax On Out-Of-State Purchases "Compensates" For The Gross Receipts Tax On Local Public Utilities

Where, as here, a taxing statute facially discriminates against interstate commerce, a "virtually *per se*" rule of unconstitutionality applies.[14] *Oregon Waste Systems, Inc. v. Department of Environmental Quality*, 114 S. Ct. 1345, 1350 (1994); *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). However, Respondent has urged that the tax exemption scheme is constitutional because it was designed to compensate for the "gross receipts tax imposed on utilities generally (but not on unregulated gas marketers)." Pet. Opp. 11 n.3 (citing *Associated Industries of Mo. v. Lohman*, 114 S. Ct. at 1824-25). The state supreme court did not adopt this rationale, and the Tax Commissioner's argument is untenable — the sales and use tax is in no way "compensatory" for the gross receipts tax.

The test for a permissible compensatory tax is well established. As this Court has explained, most recently in *Fulton Corp. v. Faulkner*, 116 S. Ct. 848 (1996), "[t]he second prong of our analysis requires that 'the tax on interstate commerce . . . be shown roughly to approximate — but not exceed — the amount of the tax on intrastate commerce.' * * * * [T]he third prong of

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[14] It is irrelevant whether Ohio had an intent to discriminate, for "a court need not inquire into the purpose or motivation behind a law to determine that in actuality it impermissibly discriminates against interstate commerce." *Associated Industries of Mo. v. Lohman*, 114 S. Ct. 1815, 1824 (1994). *See also Philadelphia v. New Jersey*, 437 U.S. 617, 626 (1978) ("legislative purpose" is "not . . . relevant to the constitutional issue to be decided"); *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 352-53 (1977).

compensatory tax analysis . . . requires the compensating taxes to fall on substantially equivalent events." *Id.* at 856-57 (citations omitted). Neither of these tests is satisfied here. For one, the two taxes are not even imposed on the same entity (the gross receipts tax is imposed upon the utility; sales and use taxes are imposed upon the purchasers of the gas). Ohio Rev. Code Ann. §§ 5741.02(B), 5727.33 (1996), 5727.38. For another, the rates of tax are different — sales and use tax is imposed at 5 to 7% of the gas's purchase price; the gross receipts tax is 4.75% of the utilities' gross receipts. Ohio Rev. Code Ann. §§ 5739.025, 5727.38. The scheme of taxation here thus fails the compensatory tax test. *Fulton Corp. v. Faulkner*, 116 S. Ct. at 855-60 & n.6; *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937).

C. The Discrimination Cannot Be Justified On The Theory That Ohio Has An Interest In Favoring Local Public Utilities

The Tax Commissioner, in another effort to sustain the discrimination, has urged that "the natural gas utility exemption has a reasonable basis, because by its nature the business of physically delivering natural gas to consumers is different from the business of brokering natural gas sales." Pet. Opp. 5. Respondent makes no claim that purchases from public utilities generally should be treated differently than purchasers from gas producers and distributors, and, indeed, he could not make such a claim since the exemption does not apply to purchases from out-of-state public utilities. Rather, the Tax Commissioner claims that the state may discriminate in favor of gas sold by local public utilities which are in "the business of physically delivering natural gas to consumers." Pet. Opp. 5. Apart from Respondent's compensatory tax argument (discussed above), he appears to argue that the differential treatment of purchases from local natural gas companies is appropriate because local natural gas

companies are more heavily regulated than producers and distributors.[15] Pet. Opp. 16.

This is nothing less than an argument that the state may afford favored treatment for unique local businesses, a proposition which has been uniformly rejected by this Court. With the deregulation of the natural gas industry, both local public utilities and non-utility sellers are competing directly with one another to sell natural gas in the burner-tip market.[16] *See supra* pp. 2-4. Non-

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[15] In opposing GM's petition for certiorari (Pet. Opp. 12-13), respondent relied on *Amerada Hess Corp. v. Director, Div. of Taxation*, 490 U.S. 66 (1989) to support its view that Ohio here is simply taxing different businesses differently, not discriminating against interstate commerce. Reliance upon *Amerada Hess* is misplaced. There, this Court upheld New Jersey's Corporation Business Tax as applied to several major oil companies. Each of the companies wished to deduct from its New Jersey taxable income its federal windfall profit taxes on crude oil production (which activities were not associated with New Jersey, but with oil-producing states). The companies argued that by denying the deduction for windfall taxes, the New Jersey tax violated each of the four prongs of the *Complete Auto* Commerce Clause test (*see Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977)). As to the "discrimination" prong of *Complete Auto*, the companies claimed that the tax discriminated "against oil producers who market their oil in favor of independent retailers who do not produce oil," and thus had no windfall profits. *Amerada Hess*, 490 U.S. at 78. This Court said that the companies' argument "miss[es] th[e] essential point" of the Commerce Clause (*id.* at 77), because state lines were irrelevant to a distinction between producers and retailers. The claimed discrimination rested on "the nature of their businesses," not "the location of their activities," since both producers and retailers "may operate both in New Jersey and outside the State." *Id.* at 78. No such distinction can be drawn here since the location of the exempt seller *is* determinative.

[16] As the *Wall Street Journal* has recently reported, these regulatory changes "have already meant savings for the largest customers. The Archdiocese of Chicago, for example, saved $8 million over the past five years for its 377 parishes by buying its gas from a unit of Houston-based Enron Corp. instead of local gas companies." Fritsch, *Tired of*

utility sellers, although relatively new to the marketplace, are competing quite successfully against the utilities, and it is not appropriate for Ohio to favor the in-state utilities who compete in the natural gas marketplace.

Ohio's tax preference for natural gas sold by its own public utilities, however, endeavors to give that local industry an impermissible "leg up" in the natural gas market, contrary to the ironclad rule that "[n]o State, consistent with the Commerce Clause, may 'impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business.'" *Boston Stock Exchange v. State Tax Comm'n,* 429 U.S. 318, 329 (1977) (*quoting Northwestern States Portland Cement Co. v. Minnesota,* 358 U.S. 450, 457 (1959)). As this Court has so often stated, when the effect of a state statute "is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry." *Brown-Forman Distillers Corp. v. New York Liquor Auth.,* 476 U.S. 573, 579 (1986). *See also Westinghouse Elec. Corp. v. Tully,* 466 U.S. 388, 406 (1984) (holding unconstitutional a franchise tax which favored sales made in-state and "burden[ed] commerce in other States in an attempt to induce 'business operations to be performed in the home State that could more efficiently be performed elsewhere.'") (*quoting Boston Stock Exchange,* 429 U.S. at 336).

In *Baldwin v. G.A.F. Seelig, Inc.,* 294 U.S. 511 (1935), Justice Cardozo dispatched a similar argument. There, the state argued that local milk farmers were uniquely qualified to assure "a regular and adequate supply of pure and wholesome milk," *id.* at 522-23, thus justifying a Milk Control Act favoring local

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Phone Wars? Get Ready for a Fight To Sell Natural Gas, Wall St. J., April 16, 1996, at A1. And now that the cost of transportation and delivery has been "unbundled" from the cost of gas, producers and marketers of gas are beginning to offer their goods to smaller gas buyers, such as homeowners. The result is that "more customers are getting a choice — and often a lower gas bill." *Id.*

farmers. As Justice Cardozo explained "[w]ith his characteristic eloquence" (*West Lynn Creamery, Inc. v. Healy*, 114 S. Ct. 2205, 2218 (1994)), such an exception would swallow the Commerce Clause whole:

> Let such an exception be admitted, and all that a state will have to do in times of stress and strain is to say that its farmers and merchants and workmen must be protected against competition from without, lest they go upon the poor relief lists or perish altogether. To give entrance to that excuse would be to invite a speedy end of our national solidarity. The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.

Baldwin v. G.A.F. Seelig, 294 U.S. at 523.

More recently, in *West Lynn Creamery*, 114 S. Ct. 2205, the Court rejected Massachusetts' argument that the "unique open space and related benefits" conferred upon the state by the Massachusetts dairy industry justified the tax/subsidy combination that favored in-state milk farmers. *Id.* at 2217 n.20. As the Court noted, to accept such an argument "would make a virtue of the vice that the rule against discrimination condemns. Preservation of local industry by protecting it from the rigors of interstate competition is the hallmark of the economic protectionism that the Commerce Clause prohibits." *Id.* at 2217.

Substantially the same argument was also rejected in *Bacchus*. The "ti root okolehao" industry was certainly unique to Hawaii (ti root being native to Hawaii), yet Hawaii was not allowed, consistent with the Commerce Clause, to favor that unique industry by making okolehao tax-exempt. *Bacchus*, 468 U.S. at 272.

Stripped of its rhetoric concerning the supposed special status of Ohio public utilities, the Tax Commissioner's argument boils down to this: A state may discriminate against goods which are

delivered into the state by common carriage rather than by the seller's own local distribution network. This argument has already been explicitly rejected by this Court in a long series of cases involving mail-order sales. Those cases made clear that mail-order sales, where the goods are delivered into the state by mail or common carrier, cannot be taxed at a higher rate than sales by retail establishments within the state.

The most recent of these cases is *Associated Industries v. Lohman*, 114 S. Ct. 1815, where some Missouri municipalities imposed a higher use tax on goods delivered into the state by mail and common carrier than the sales tax it imposed on goods sold locally at retail. This Court held the tax invalid under the Commerce Clause, because "[w]here the use tax exceeds the sales tax, the discrepancy imposes a discriminatory burden on interstate commerce. Out-of-state goods brought into such a jurisdiction are subjected to a higher levy than are goods sold locally. The resulting disparity is incompatible with what we have termed the 'strict rule of equality adopted in *Silas Mason.*'" *Associated Industries*, 114 S. Ct. at 1821. Even before *Associated Industries*, it was well established that a state could not discriminate between sales by mail or common carrier, and sales at retail. *See, e.g., Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64; *Maryland v. Louisiana*, 451 U.S. 725 (1981); *see also Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 115 S. Ct. at 1343 (a tax scheme may not "apply differently to goods and services purchased out-of-state" and brought in to the taxing state than to "those purchased domestically").

This Court has likewise repeatedly invalidated state laws which impose other forms of discriminatory taxation on distribution of goods from outside the state to points within the state. For example, in *West Point Wholesale Grocery Co. v. City of Opelika*, 354 U.S. 390 (1957), this Court invalidated an Alabama tax on the delivery of groceries at wholesale from points outside the locality, reasoning that a state could not impose a discriminatory tax (in that case a flat tax) on "the solicitation of orders and the subsequent delivery of goods at the end of an uninterrupted movement in interstate commerce, such a tax having

a substantial exclusory effect on interstate commerce." *Id.* at 391. If a state cannot impose a discriminatory tax on the delivery of goods from outside the state, it necessarily follows that it cannot impose a discriminatory tax on the seller's failure to itself deliver the goods inside the state.

Were Ohio's exemption scheme to be upheld, a giant loophole would be carved into the Commerce Clause. The Ohio Supreme Court's specific holding could be utilized to justify extensive discrimination between local public utility sellers and their competitors. This is not an issue unique to the natural gas marketplace. Deregulation in the electric and telephone markets has created, and will create, competition between traditional public utilities and new entrants. FERC, "[s]purred on by its experience of deregulating the natural gas industry and by the electric power shortages during the winter of 1993-1994"[17] is now in the process of restructuring the electric power industry. "[T]he common thread" running through FERC's deregulating and restructuring initiatives in both the natural gas and electricity markets is "the goal to foster greater competition" in the marketplace "by means of open access to transmission."[18] Similarly, the recently enacted Communications Act of 1995 has as one of its "primary objective[s] . . . to foster competition for local exchange and exchange access services"[19] by opening the marketplace "to allow competition for local telephone service by cable, wireless, long distance, and satellite companies, and

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[17] Pendley, *Deregulation of the Energy Industry*, 31 Land & Water L. Rev. 27, 61 (1996). *See also* Pierce, *The State of the Transition To Competitive Markets In Natural Gas and Electricity*, 15 Energy L. J. 323, 324-25 (1994).

[18] *Santa: F.E.R.C. No Moses, But Policies Are Guide For New Power Industry*, Inside F.E.R.C., Jan. 23, 1995, at 1 (internal quotations omitted).

[19] H.R. Rep. No. 104-204, 104th Cong., 1st Sess. 81 (1995).

electric utilities, as well as other entities."[20] Put simply, in these newly deregulated marketplaces, where national competition is favored as a matter of federal policy, state tax favoritism of the traditional local public utilities at the expense of new, out-of-state competitors is a substantial risk, and, if sustained, could stifle these newly competitive markets.

In addition, it is easy to imagine numerous other examples of tax discrimination that the Ohio Supreme Court's decision could be used to justify. Even in the non-utility context, out-of-state sellers of any goods, likely to lack distribution networks in states distant from their own, could be subjected to discriminatory taxation simply because they do not themselves transport the goods to the purchaser's doorstep. Ohio could apply the reasoning approved by the court below and exempt purchases of local newspapers delivered by the paper from sales tax, on the stated ground that those local papers utilize their own delivery services. Purchases of otherwise-similar national newspapers (*e.g., USA Today, The New York Times, The Wall Street Journal*), which contract with others for delivery services, would still be taxed. The result would plainly be favoritism of the local newspaper.

Next, Virginia could use the same logic to exempt sales tax on purchases of furniture from stores which deliver using their own delivery trucks. Virginia stores would be favored over stores in High Point, North Carolina, which are well known for selling furniture at deep discount prices, but ship their goods to buyers in other states by common carrier. The result: Higher-priced local furniture gains a tax advantage, distorting (or destroying entirely) the price advantage possessed by the North Carolina sellers. *Compare, e.g., West Lynn Creamery,* 114 S. Ct. 2211.

New York could then exempt from tax all milk sold in the state, but only if delivered by the milk producer's in-state distribution facilities. The effect of that tax, too, would be

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[20] S. Rep. No. 104-23, 104th Cong., 1st Sess. 5 (1995).

economic Balkanization, for Vermont milk producers simply do not have their own distribution networks in New York State. *Compare id.*

The discrimination here is particularly intolerable because the tax is not imposed on the seller's business, but on the purchase of natural gas. The gas sold by producers and marketers, and by local public utilities, is identical, and is delivered through identical pipelines. The gas which GM purchased, like the gas which public utilities sell, was delivered from the gas-producing areas of the United States through interstate pipelines, and then, in virtually all cases, through local distribution companies (public utilities), and to the consumer. *E.g.*, J.A. 41-42. *See also* Pet. Opp. 12, 15 (where the Commissioner notes that gas sold by out-of-state marketers and gas sold by local public utilities is physically delivered to the customer through the same facilities). Indeed, the gas is sold to identical buyers. Whether or not differential treatment of local public utilities and producers or marketers could ever be justified, there is no basis for a differential tax treatment of the natural gas itself as used by identical purchasers. As this Court noted just last Term, "States are barred from discriminating against foreign enterprises competing with local businesses . . ., and from discriminating against commercial activity occurring outside the taxing State." *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 115 S. Ct. at 1344-45. It is equally well established that "discrimination between in-state and out-of-state *goods* is as offensive to the Commerce Clause as discrimination between in-state and out-of-state *taxpayers*." *Bacchus*, 468 U.S. at 268 n.8 (emphasis added).

Plainly there can be no justification here for the discriminatory treatment.

D. General Motors Does Not Lack Standing To Challenge The Discrimination

The Ohio Supreme Court's second justification for its decision was equally erroneous. That court appeared to hold that GM, the taxpayer, had no standing to challenge the tax under the

Commerce Clause because "GM is not a member of that class" of "out-of-state vendors of natural gas." Pet. App. 4a. The supreme court reached this conclusion despite the fact that the Ohio use tax is imposed on consumers, such as GM. Ohio Rev. Code Ann. § 5741.02. Several decisions of this Court establish that this holding, too, was erroneous.

The Commerce Clause protects more than sellers; it also protects purchasers who wish to buy goods in the national marketplace. As Justice Jackson explained in the seminal case of *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525 (1949), the Commerce Clause not only protects "every farmer" and "every craftsman"; it also protects "every consumer":

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them. Likewise, *every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any.* Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.

Id. at 539 (emphasis added). *See also West Lynn Creamery*, 114 S. Ct. at 2218 (same). The Commerce Clause protects the rights of all participants to "engage in commerce"; that clause confers "a freedom to trade with any State, to engage in commerce across all state boundaries." *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. at 335. Under the principles of these cases, a purchaser of out-of-state goods plainly has standing to challenge a discriminatory tax on Commerce Clause grounds. Indeed, where the incidence of the tax falls on the purchaser, as it does here, only the purchaser may have a sufficient incentive to challenge the tax.

The decision below is also at odds with this Court's specific holding in *Bacchus*. There, the state also urged that the petitioners lacked standing under the Commerce Clause.

Petitioners were wholesalers of liquor who were obliged by State law to add the 20% excise tax to their sales price, to collect the tax, and to remit it to the State. 468 U.S. at 266. The Court held that the wholesalers had standing in part because "they must return the tax to the State." *Id.* at 267. GM, too "must return the tax to the state"; that is enough for it to have standing to raise a Commerce Clause violation. Indeed, we are aware of no other case from this Court in which a payor of a tax was held to lack standing to challenge the constitutionality of that tax under the Commerce Clause.

The error of the decision below is further confirmed by recent decisions of this Court which have allowed in-state taxpayer-purchasers to bring Commerce Clause claims even though the "class" of businesses being discriminated against was a class of out-of-state sellers. In *Associated Industries,* where Missouri's use tax was at issue, one of the petitioners, Alumax Foils, Inc., was "a manufacturing firm in Missouri that pays the additional use tax on goods purchased from outside the state." 114 S. Ct. at 1819. Alumax and Associated Industries' Commerce Clause claim was successful; no "standing" problem with Alumax's claim was even adverted to by this Court or by the Missouri court below. *See Associated Industries v. Director of Revenue,* 857 S.W.2d 182 (Mo. 1993), *reversed*, 114 S. Ct. 1815 (1994).

In *West Lynn Creamery,* decided later that same Term, in-state milk *dealers* successfully brought a Commerce Clause challenge to a Massachusetts milk pricing order, even though the "class" being discriminated against was out-of-state milk *farmers*, from whom the in-state dealers purchased their raw milk supply. 114 S. Ct. at 2209. Again, no "standing" concerns were present. *See id.* at 2216 ("State taxes are ordinarily paid by in-state businesses and consumers, yet if they discriminate against out-of-state products, they are unconstitutional").

And in *Fulton Corp. v. Faulkner,* 116 S. Ct. 848, the petitioner, Fulton Corporation, was "a North Carolina company owning stock in other corporations that do business out of state." *Id.* at 852. Fulton Corporation successfully argued that North

Carolina's taxation of corporate stock according to the issuing corporation's exposure to the state income tax violated its Commerce Clause rights. Plainly Fulton Corporation, "a North Carolina company," was not itself a member of the discriminated-against class of foreign corporations issuing stock to be sold to North Carolina residents. *See id.* at 855 (the tax "favors domestic corporations over their foreign competitors in raising capital among North Carolina residents"). Yet, as a buyer of such stock, Fulton Corporation — the payor of the tax — was allowed to press its Commerce Clause challenge to the tax to a successful conclusion. *Id.* at 861. Each of these in-state petitioners had standing to press these (successful) Commerce Clause challenges to state taxes because each was injured by the discrimination against interstate commerce. The same can be said of GM here.

Moreover, GM would have had standing even if it had been raising rights belonging not to itself, but to the "class" of out-of-state sellers. Under this Court's "prudential" standing doctrine of *jus tertii,* GM also has standing to raise the constitutional rights of its sellers: (1) GM suffered an "injury in fact" by being forced to pay the discriminatory taxes; (2) buyers and sellers have a sufficiently close relationship to allow one to raise the rights of the other, *Craig v. Boren,* 429 U.S. 190, 195-96 (1976) (vendor allowed to raise equal protection rights of customers); and (3) the out-of-state sellers, who likely make only a minimal percentage of their sales in Ohio, and are not liable for the taxes in any event, would have little, if any, incentive to challenge the statute in their own name. *See generally Singleton v. Wulff,* 428 U.S. 106 (1976).

Plainly GM in this case was raising its own Commerce Clause-protected "'right' to engage in interstate trade free from restrictive state regulation." *Dennis v. Higgins,* 498 U.S. 439, 448 (1991). And even if the asserted "right" had belonged not to GM, but to the out-of-state sellers of gas, GM would have had standing to raise their rights as well. The contrary decision of the Ohio Supreme Court is untenable.

II. THE DISCRIMINATORY TAX ALSO VIOLATES THE EQUAL PROTECTION CLAUSE

As discussed in Section I above, the Ohio use tax as interpreted by that state's supreme court favors purchases of gas from in-state sellers of natural gas, specifically local public utilities. Although the Court need not reach GM's Equal Protection Clause challenge if it determines that the discrimination violates the Commerce Clause (*see, e.g., Kraft General Foods, Inc. v. Iowa Dep't of Revenue & Finance,* 505 U.S. 71, 82 n.25 (1992)), it is clear that the use tax exemption also violates the Equal Protection Clause by favoring those who purchase gas from in-state sellers, largely at the expense of customers engaged in interstate commerce such as GM.

The Equal Protection Clause is designed to assure that "all persons similarly circumstanced shall be treated alike." *Royster Guano Co. v. Virginia,* 253 U.S. 412, 415 (1920). Ohio treats those who purchase gas from out-of-state sources in a manner different from — and more harshly than — those who purchase gas from in-state public utilities, thus creating an unconstitutional classification. The Ohio Supreme Court's decision, which rejected GM's Equal Protection claim for the same reasons as it had rejected GM's Commerce Clause claim, was erroneous.

Under the Equal Protection Clause, taxing classifications "'must rest upon some ground of difference having a fair and substantial relation to the object of the legislation.'" *Allied Stores of Ohio v. Bowers,* 358 U.S. 522, 527 (1959) (quoting *Royster Guano Co. v. Virginia,* 253 U.S. at 415). Here, the classification is between natural gas sold by in-state utilities and natural gas sold by other types of sellers. The object of the legislation, Ohio apparently claims, is to recognize and compensate for the gross-receipts tax and regulatory burdens which the state imposes upon utilities. Pet. Opp. 16-17.

The differential tax treatment of the identical property — natural gas — would violate the Equal Protection Clause even under a rational basis standard, *see Allegheny Pittsburgh Coal Co. v. County Comm'n of Webster Cty.,* 488 U.S. 336, 346 (1989),

because Ohio is taxing *identical* (not just "similar") property differently depending on the identity of the seller. Since the tax at issue is a sales and use tax on personal property, which is imposed upon and paid by the *buyer*, such a distinction, which is based on the identity of the seller, is irrational.

But because the classification employed by Ohio here implicates the constitutionally protected "'right' to engage in interstate trade free from restrictive regulation" (*Dennis v. Higgins*, 498 U.S. at 448), a closer judicial look is required. Although states are ordinarily accorded a wide latitude under the Equal Protection Clause in determining what and how to tax (*see Ohio Oil Co. v. Conway*, 281 U.S. 146, 159 (1930)), this latitude is significantly cabined when a discriminatory taxing scheme implicates other constitutional rights. "Classic examples are the taxes that discriminated against . . . interstate commerce (*see Michigan-Wisconsin Pipe Line v. Calvert*, 347 U.S. 157 [(1954)] or required licenses to engage in interstate commerce." *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 n.3 (1973). Similarly, in *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985), this Court expressly held "that promotion of domestic business within a State, by discriminating against foreign corporations that wish to compete by doing business there, is not a legitimate state purpose." *Id.* at 880.

This requirement of heightened judicial scrutiny where a taxing distinction burdens the right to engage in interstate commerce is consistent with the rule that distinctions which implicate another constitutionally protected right, such as the right to travel, are subject to enhanced Equal Protection Clause scrutiny:

> Whenever a state law infringes a constitutionally protected right, we undertake intensified equal protection scrutiny of that law. * * * * It is well established that . . . where a law classifies in such a way as to infringe constitutionally protected fundamental rights, heightened scrutiny under the Equal Protection Clause is required.

Attorney General of New York v. Soto-Lopez, 476 U.S. 898, 904, 906 n.6 (1986) (plurality opinion) (citations omitted). *See*

Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (interstate commerce); *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985) (right to travel); *Williams v. Vermont*, 472 U.S. 14 (1985) (same).

In sum, the tax not only violates the Commerce Clause; it also violates GM's equal protection rights.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Ohio should be reversed.

Respectfully submitted,

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May 16, 1996

STATUTORY APPENDIX

Ohio Revised Code Annotated § 5727.01, entitled **"Definitions,"** provides in pertinent part:

As used in this chapter:

(A) "Public utility" means each person referred to as a telephone company, telegraph company, electric company, natural gas company, pipe-line company, water-works company, water transportation company, heating company, rural electric company, or railroad company.

* * * *

(D) Any person:

* * * *

(4) Is a natural gas company when engaged in the business of supplying natural gas for lighting, power, or heating purposes to consumers within this state; . . . .

Ohio Revised Code Annotated § 5727.33, entitled **"Determination of gross receipts,"** provides in pertinent part:

(A) For the purpose of computing the public utility excise tax, the tax commissioner shall ascertain and determine the entire gross receipts actually received from all sources, excluding the receipts described in divisions (B), (C), and (D) of this section, of each electric, rural electric, natural gas, pipe-line, water-works, heating, and water transportation company for business done within this state for the year ending on the thirtieth day of April, and of each telegraph and telephone company for business done within this state for the year ending on the thirtieth day of June.

(B) In ascertaining and determining the gross receipts of each of the companies named in this section, the commissioner shall exclude all of the following:

(1) All receipts derived wholly from interstate business;

(2) All receipts derived wholly from business done for or with the federal government;

(3) For the year ending April 30, 1990, and each subsequent year, all receipts derived wholly from the transmission or delivery of electricity to or for a rural electric company, provided that the electricity that has been so transmitted or delivered is for resale by the rural electric company;

(4) All receipts from the sale of merchandise;

(5) All receipts from sales to other public utilities, except railroad, telegraph, and telephone companies, for resale, provided the other public utility is required to file a statement pursuant to section 5727.31 of the Revised Code.

Ohio Revised Code Annotated § 5727.38, entitled **"Excise tax on gross receipts of certain public utilities,"** provides:

On or before the first Monday of November, annually, the tax commissioner shall assess an excise tax against each public utility except railroad companies. The tax shall be computed by multiplying the gross receipts as determined by the commissioner under section 5727.33 of the Revised Code by six and three-fourths per cent in the case of pipe-line companies and four and three-fourths per cent in the case of all other companies. The minimum tax for any such company for owning property or doing business in this state shall be ten dollars. The assessment shall be certified to the taxpayer and treasurer of state.

Ohio Revised Code Annotated § 5739.02, entitled **"Levy of sales tax; purpose; rate; exemptions,"** provides in pertinent part:

For the purpose of providing revenue with which to meet the needs of the state, for the use of the general revenue fund of the state, for the purpose of securing a thorough and efficient system of common schools throughout the state, and for the purpose of affording revenues, in addition to those from general property taxes, permitted under constitutional limitations, and from other sources, for the support of local governmental functions, and for

the purpose of reimbursing the state for the expense of administering this chapter, an excise tax is hereby levied on each retail sale made in this state.

(A) The tax shall be collected pursuant to the schedules in section 5739.025 of the Revised Code.

The tax applies and is collectible when the sale is made, regardless of the time when the price is paid or delivered.

* * * *

(B) The tax does not apply to the following:

* * * *

(7) Sales of natural gas by a natural gas company, of electricity by an electric company, of water by a water-works company, or of steam by a heating company, if in each case the thing sold is delivered to consumers through wires, pipes, or conduits, and all sales of communications services by a telephone or telegraph company, all terms as defined in section 5727.01 of the Revised Code;

* * * *

Ohio Revised Code Annotated § 5741.02, entitled **"Levy of tax; rate; exemptions,"** provides in pertinent part:

(A) For the use of the general revenue fund of the state, an excise tax is hereby levied on the storage, use, or other consumption in this state of tangible personal property or the benefit realized in this state of any service provided. The tax shall be collected pursuant to the schedules in section 5739.025 of the Revised Code.

(B) Each consumer, storing, using, or otherwise consuming in this state tangible personal property or realizing in this state the benefit of any service provided shall be liable for the tax, and such liability shall not be extinguished until the tax has been paid to this state; provided that the consumer shall be relieved from further liability for the tax if the tax has been

paid to a seller in accordance with section 5741.04 of the Revised Code or prepaid by the seller in accordance with section 5741.06 of the Revised Code.

(C) The tax does not apply to the storage, use, or consumption in this state of the following described tangible personal property or services, nor to the storage, use, or consumption or benefit in this state of tangible personal property or services purchased under the following described circumstances:

(1) When the sale of property or service in this state is subject to the excise tax imposed by sections 5739.01 to 5739.31 of the Revised Code, provided said tax has been paid;

(2) Except as provided in division (D) of this section, tangible personal property or services, the acquisition of which, if made in Ohio, would be a sale not subject to the tax imposed by sections 5739.01 to 5739.31 of the Revised Code;

(3) Property or services, the storage, use, or other consumption of or benefit from which this state is prohibited from taxing by the constitution of the United States, laws of the United States, or the constitution of this state. This exemption shall not exempt from the application of the tax imposed by this section the storage, use, or consumption of tangible personal property which was purchased in interstate commerce, but which has come to rest in this state, provided that fuel to be used or transported in carrying on interstate commerce which is stopped within this state pending transfer from one conveyance to another is exempt from the excise tax imposed by this section and section 5739.02 of the Revised Code . . . .

(14)

Supreme Court, U.S.
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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1995

GENERAL MOTORS CORPORATION,
Petitioner,

v.

ROGER W. TRACY, TAX COMMISSIONER OF OHIO,
Respondent.

On Writ of Certiorari to the
Supreme Court of Ohio

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Does the dormant Commerce Clause or the Equal Protection Clause compel States to tax purchases from natural gas public utilities and natural gas marketers in the same way, where the former undertake a heavily-regulated public service obligation to sell and deliver gas on demand while the latter do not?

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STATEMENT

This case involves the constitutionality of a 62 year old tax exemption that applies to purchases of natural gas from regulated public utilities but not to purchases of natural gas from unregulated marketers. In making this classification, Ohio has drawn on a deep tradition of federal and state law respecting the unique public services performed by State utilities and the unique regulatory status given to them. In order to put Ohio's reliance on this classification in context, it is important briefly to describe the nature of the natural gas market, the evolution of federal and state regulations in this area, and the origin of this tax exemption.

A. The Natural Gas Market.

From beginning to end, there are four essential tasks performed by participants in the natural gas market: (1) extracting the gas, (2) physically transporting it through pipelines, (3) brokering sales of the gas, and (4) consuming it. Extraction is performed almost exclusively by producers of natural gas. They locate, drill for, and ultimately withdraw gas from underground reservoirs located throughout the country, including Ohio. They then prepare the gas for transportation.

Transportation of the gas has long been performed by two different participants in the market -- local natural gas utilities (otherwise known as "local distribution companies" or "LDCs") and interstate pipeline companies. The federally-regulated interstate pipeline companies transport the gas between the States, while the State-regulated utilities transport the gas within each State. Both companies own or control their respective transportation equipment.

Brokering sales of natural gas has long been performed by various participants in the market. Whether it be producers, interstate pipeline companies, public utilities

or independent marketers, they have all had authority to broker sales of natural gas. What has changed over time, as shown below, is the ability of each market participant to sell gas and the accessibility of the end user to each seller. Finally, consumption of natural gas is divided into residential and industrial use. Residential end users buy natural gas primarily to heat their homes, while industrial end users buy the gas primarily for manufacturing purposes. J.A. 74.

B. Federal Regulation of the Natural Gas Market.

Congress has not been inactive in regulating the natural gas market under its Commerce Clause powers. For nearly sixty years, it has exercised broad authority in this area, both through federal legislation and through the rulemaking powers of the agency responsible for natural gas, now known as the Federal Energy Regulatory Commission ("FERC"). The one constant in these federal regulations has been a hands-off policy with respect to State regulation of "intrastate" distribution of natural gas. *See* 15 U.S.C. § 717(c).

In 1938, Congress enacted the Natural Gas Act, 15 U.S.C. § 717, *et seq.*, which established a regulatory dichotomy between interstate and intrastate distribution of natural gas. The legislation thus regulated the transmission of natural gas through interstate pipeline companies, and allowed the newly-created federal commission to set rates for sales by these companies. 15 U.S.C. § 717(d). At the same time, the law gave the States authority to regulate intrastate distribution of natural gas through their public utilities.

After passage of the legislation, the structure of the natural gas industry remained straightforward. Producers sold gas in the production area to interstate pipelines at

prices set by the federal commission. The pipelines, in turn, transported the gas to the "city gate" -- the point at which the interstate pipelines met the distribution systems of the local utilities. The utilities then sold the gas directly to industrial and residential consumers at rates set by their public utility commissions. Under this regulatory regime, neither producers nor independent marketers sold gas directly to utilities or end-users.

In 1953, Congress amended the Natural Gas Act to resolve a problem of overlapping state and federal regulation caused by the Court's decision in *Federal Power Comm'n v. East Ohio Gas*, 338 U.S. 464 (1950). In *East Ohio Gas,* the Court allowed the federal commission to regulate intrastate distribution of natural gas by local utilities. *Id.* at 472. In direct response, Congress "eliminate[d] this duplication by leaving the jurisdiction over these companies [*i.e.*, public utilities] exclusively in the States, as always has been intended." H.R. Rep. No. 899, S. Rep. No. 817, 83d Cong., 2d Sess. (1953), *reprinted in* 1954 U.S.C.C.A.N. 2101, 2102. After the 1953 amendments, responsibility for regulating natural gas utilities once again lay with the States and their public utility commissions. 15 U.S.C. § 717(c) (granting the States "jurisdiction" over "natural gas received . . . within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State").

In 1978, Congress took an initial step toward lowering competitive barriers in the interstate natural gas markets by enacting the Natural Gas Policy Act. *See* 15 U.S.C. § 3391, *et seq*. For the first time, the law gave utilities and industrial end-users limited ability to purchase gas directly from producers and to transport the gas through interstate pipelines. *Id.*

In 1985, FERC continued to deregulate this aspect of

the market. It established a rule of open access to interstate pipelines, which permitted public utilities and industrial end-users to buy gas directly from producers and marketers in the production area, and then to ship that gas via interstate pipelines. *See* Order No. 436, Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, 50 Fed. Reg. 42,408 (1985) (to be codified at 18 C.F.R. § 2), *Associated Gas Distribs. v. FERC*, 824 F.2d 981 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988).

In 1992, FERC took the policy of open access to interstate pipelines a step further. It required all pipelines to "unbundle" their transportation services from their commodity-sales services. This meant that marketers, public utilities and industrial consumers could buy natural gas directly from the purchaser and then arrange separately to pay for the interstate and intrastate transportation of the commodity. *See* Order No. 636, Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, 57 Fed. Reg. 13,267, 13,269 (1992) (to be codified at 18 C.F.R. § 284).

Through each of these changes in federal law, Congress continued to delegate primary authority to the States for regulating intrastate distribution of natural gas.

C. State Regulation of the Natural Gas Market.

1. State Law Prior to Federal Deregulation.

Prior to the wave of federal deregulation that hit the natural gas industry between 1978 and 1992, Ohio regulated participants in the market in one of two general ways.

Natural gas utilities lived under a distinct regulatory regime, while all other participants in the natural gas market were simply regulated like other Ohio businesses.

Ohio has long imposed unique regulatory burdens on natural gas utilities, as well as other utilities, in view of the important public service they perform and the distribution monopoly that they possess. For example, natural gas utilities:

* Must serve all members of the public and must ensure access to natural gas for residential and industrial consumers alike, R.C. § 4905.03; R.C. § 4905.06;

* Must guarantee a supply of natural gas for all consumers at all times, and thus must enter into costly long-term purchase and storage contracts, R.C. § 4905.22;

* May not set their own rates and are prohibited from selling natural gas above cost, R.C. § 4905.302;

* May not terminate service for non-payment in the winter, R.C. §§ 4933.12, 4933.122; and

* Must meet complex reporting requirements and may not issue

> securities or enter into contracts without the permission of the Ohio public utility commission, R.C. §§ 4905.14, 4905.40, 4905.41, 4905.48, 4935.04.

In return for these unique regulatory burdens and for the special public service that utilities provide, public utilities receive unique regulatory benefits. For example, utilities:

* Have powers of eminent domain, R.C. § 1723.01-.03; and

* Are assured a reasonable return on their capital equipment, R.C. § 4909.15.

Nor has Ohio historically limited the unique regulation of public utilities to rates, access, eminent domain powers and the like. The State has long treated public utilities differently from other businesses for purposes of taxation. Utilities pay essentially three types of taxes: (1) a personal property tax on 88% of the true value of their property, R.C. § 5727.111; (2) a special tax assessment for the expenses of the Public Utility Commission of Ohio, R.C. § 4905.10, and for the expenses of the Ohio Consumer Counsel, R.C. § 4911.18; and (3) a gross receipts tax of 4.75% on their accumulated sales. In contrast, other Ohio businesses generally pay the following taxes: (1) a personal property tax on 25% of the value of their property, R.C. § 5711.22; and (2) a franchise tax, R.C. § 5733.01, *et seq.*

2. State Law After Federal Deregulation.

Continuity and change marked Ohio's regulation of distributors of natural gas after federal deregulation. On the one hand, public utilities saw virtually no change in their regulation. They continued to face the same oversight, pay the same types of taxes, and live under the same restrictions on pricing and delivering natural gas. On the other hand, federal deregulation gave rise to a new industry of independent marketers who could make direct sales to Ohio consumers but were not subjected to this regulatory regime. Though in-state and out-of-state marketers do business in Ohio, they are regulated the same without regard to their location. Ohio ultimately decided to regulate marketers in the same way it generally regulates other businesses that sell tangible personal property in the State.

In the aftermath of federal deregulation, Ohio now has two very different sets of rules governing the entities responsible for making final sales of natural gas to Ohio consumers:

Public Utilities	Marketers
Sales price set by regulators.	Sales price set by market.
Must sell to all consumers.	Can sell to whomever they please.
Operate pipelines.	Do not operate pipelines.
Limited ability to terminate for non-payment.	May terminate whenever contract permits.

Public Utilities	Marketers
May correct for underbilling for restricted reasons.	May correct for underbilling at any time.
Face heavy utility disclosure requirements.	Face no utility disclosure requirements.
Must treat customers equally on an average cost basis.	May negotiate different deals with different customers.
Need approval from PUCO to issue securities, issue bonds or enter into a contract.	No such approval needed.
Must submit long-term forecasts to PUCO detailing future demand and supply of gas.	No such reporting requirements.
Pay personal property tax on 88% of true value.	Pay personal property tax on 25% of true value.
Pay a tax assessment for PUCO expenses.	Exempt from PUCO assessment.
Pay gross receipts tax of 4.75%.	Pay franchise tax.

3. The Ohio Sales and Use Tax Exemption.

In 1934, the Ohio legislature enacted the tax

exemption now under attack. Included in the same bill that established Ohio's first sales tax on tangible personal property, the provision exempted from taxation all purchases from public utilities. 1934 Laws of Ohio 115 Pt. II 306, 308.

In its current (essentially unchanged) form, the statute exempts the following purchases from the sales tax:

> Sales of natural gas by a natural gas company, of electricity by an electric company, of water by a water-works company, or of steam by a heating company, if in each case the thing sold is delivered to consumers through wires, pipes, or conduits, and all sales of communications services by a telephone or telegraph company, all terms as defined in section 5727.01 of the Revised Code.

R.C. § 5739.02(B)(7). To be a "natural gas company," one must be

> engaged in the business of supplying natural gas for lighting, power, or heating purposes to consumers within this state.

R.C. § 5727.01(D)(4). A similar definition of "natural gas company" applies to the statutes governing Ohio's public utility commission. *See* R.C. § 4905.03(A)(6) (companies "engaged in the business of supplying natural gas for lighting, power, or heating purposes to consumers within this state").[1]

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[1] Ohio also imposes a complementary tax on the use of tangible personal property in Ohio. R.C. § 5741.02. The use tax does not apply to purchases that, "if made in Ohio, would be a

From its inception, this exemption was designed to account for another tax already paid by public utilities. Because utilities were subject to the gross receipts tax, 101 Ohio Law 399, 412-13 (1910), the legislature determined that there was no need to impose a separate 5% sales tax on each individual purchase of the commodity. "[T]he whole legislative course," the Ohio Supreme Court has recognized, "shows an intent to avoid double taxation of receipts whether they come from sales proper or are the 'gross receipts' of utilities that are subject to the excise tax under [R.C. § 5727.30 and .31]." *Haefner v. City of Youngstown*, 68 N.E.2d 64, 67 (1946).

The tax exemption, however, does not apply to natural gas sales by unregulated marketers, who likewise do not pay Ohio's 4.75% gross receipts tax. In construing the statute, the Ohio Supreme Court has determined that marketers are not natural gas utilities because they do not "own or operate the transportation and distribution equipment and deliver the natural gas to consumers in Ohio." G.M. Petition for Certiorari Appendix ("Pet. App.") 3a. *See also Chrysler Corp. v. Tracy*, 652 N.E.2d 185, 187 (Ohio 1995).

D. Impact of Deregulation and the Tax Exemption on the Ohio Natural Gas Market.

While deregulation of natural gas sales has had a significant impact on the Ohio market, the record contains no indication that the tax exemption has impacted the free flow of natural gas in Ohio or elsewhere. Over the last decade and a half, the principal change has been a segregation of the industrial and residential markets. Independent marketers now control roughly 90% of the industrial market, while

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sale not subject" to the sales tax. R.C. § 5741.02(C)(2).

utilities continue to dominate the residential market. *See* J.A. 194; *In re FERC Order 636*, No. 93-1636-GA-UNC (PUCO Entry at 7) (Dec. 1, 1994). Thus, even though deregulation facilitated marketers' efforts to sell directly to residential customers, they have not done so. The apparent reason for this development has nothing to with the sales and use tax exemption, and everything to do with the Ohio requirement that all suppliers of natural gas to "human needs customers" provide a firm backup supply of gas. *Id.* "Human needs customers" include all residential consumers as well as hospitals, college dormitories and other uses involving principal living quarters. *Id.* at Appendix A, 9-10. In-state or out-of-state marketers willing to undertake the obligation to provide a firm backup supply of gas and the other duties of a public utility could qualify as Ohio utilities and thus obtain the benefits of the tax exemption.

E. The Natural Gas Transactions in Dispute.

The natural gas transactions at issue arose during the audit period January 1, 1987 through December 31, 1989, Pet. App. 7a. Each of the disputed transactions involves purchases from independent marketers, Pet. App. 1a, and concerns purchases both from Ohio-based and out-of-state marketers. *Id.;* J.A. 16-57 (Ex. 10-A), 142, 148-50, 192 (Ex. 9A-15H). In each instance, General Motors' purchase contracts provided that the contract would become void if the marketer became subject to regulation as a public utility. *See, e.g.*, J.A. 37-38.

F. The Ohio Supreme Court's Decision.

General Motors presented two issues to the Ohio Supreme Court. It first made a statutory construction argument, contending that it was entitled to the tax exemption because independent marketers constituted natural

gas public utilities for tax purposes. Pet. App. 2a. Not so, the Court held: "[A] vendor in the type of sales now before us" is not a natural gas public utility under either the language of the statute or the public utility commission's interpretation of it. *Id. See also Chrysler Corp. v. Tracy*, 652 N.E.2d 185, 187 (Ohio 1995).

General Motors then argued that denying the exemption to marketers violated the Commerce and Equal Protection Clauses. *Id.* In making this argument, General Motors relied on several different factual allegations, including the following: (1) that the tax "is imposed only on goods originating outside the State," Jt. App. 262; (2) that "[t]here is no sales tax on in-state purchases of natural gas, but gas purchased out-of-State and brought into Ohio is subject to use tax," Jt. App. 262; (3) and that "GM has to purchase the gas *in Ohio* to qualify for the exemption," Jt. App. 259.

Each of these factual premises, however, was incorrect. No distinctions are made between in-state and out-of-state natural gas. And natural gas marketers and utilities engage in different businesses that warrant different treatment. The Court thus rejected General Motors' constitutional arguments, and ultimately concluded that "the commissioner does not favor in-state purchases over out-of-state purchases." Pet. App. 4a.

SUMMARY OF ARGUMENT

General Motors' dormant Commerce Clause argument contains several flaws. First, the Ohio legislature plainly did not intend to discriminate against interstate commerce when it enacted this exemption for public utilities from its sales tax in 1934. The supposed objects of discrimination (in-state and out-of-state marketers) did not even exist at that time and did

not begin selling natural gas to Ohioans until the early 1980's.

Second, the unintended consequences of the statute do not rise to the level of facial discrimination against interstate commerce. The written words do not contain an "explicit discriminatory design," *Amerada Hess Corp. v. Director, Div. Of Taxation*, 490 U.S. 66, 76 (1989), or favor an in-state entity over a "similarly situated" out-of-state counterpart, *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 88 (1987). The statutory language contains none of the hallmarks of interstate commerce discrimination: (1) the exemption is generally applicable and benefits all public utilities, not just natural gas utilities; (2) the exemption makes no classifications based on the origin of the natural gas; (3) the statute does not make it more difficult for companies headquartered out of state to become members of one or the other regulated class; and (4) the statute treats in-state and out-of-state marketers entirely the same.

Nor does Ohio's extension of the exemption to natural gas utilities, but not to unregulated marketers, alter this conclusion. Utilities undertake an obligation to serve all members of the public on demand, sell at regulated rates, and sell both a commodity (natural gas) and a service (delivery of the gas). Marketers, by contrast, undertake no statutory obligation to serve the public on demand, sell at whatever price the market will bear, and sell just a commodity (natural gas). The former is not a relevant counterpart of the latter, making it entirely permissible for Ohio to classify them differently for tax purposes.

A similar flaw plagues General Motors' allegation that Ohio denies the tax exemption to purchasers from out-of-state utilities and therefore discriminates against foreign utilities. One group simply is not like the other. When an out-of-state

utility sells to an Ohio consumer, it incurs none of the regulatory burdens of being a public utility in making that sale (*e.g.*, rate control or delivery obligations), and thus properly shares in none of the benefits Ohio extends such companies. At all events, the allegation is entirely speculative. General Motors did not purchase gas from out-of-state utilities in this instance, has not established that Ohio would deny the exemption under those circumstances, and has overlooked at least one Ohio case suggesting that General Motors' speculation is incorrect. Because the Court has "never deemed a hypothetical possibility of favoritism to constitute discrimination that transgresses constitutional commands," *Associated Indus. of Mo. v. Lohman*, 114 S. Ct. 1815, 1824 (1994), this argument must be rejected.

Third, General Motors has not argued, much less shown, any disproportionate burden on interstate commerce caused by Ohio's adherence to this traditional regulatory classification. Far from burdening marketers, in fact, it appears that the Ohio classification has been a blessing. Marketers now dominate the industrial natural gas market in Ohio, and apparently have chosen not to enter the residential market only because of the additional requirements they must meet to make such sales.

But even if impermissible discrimination existed, the statute should still be sustained because Congress has not been silent in this area and has explicitly endorsed the very classification Ohio has drawn. From 1938 to the present, Congress has clearly delegated exclusive "jurisdiction" to the States to regulate intrastate distribution of natural gas. 15 U.S.C. § 717(c). *See Northeast Bancorp, Inc. v. Board of Governors*, 472 U.S. 159, 174 (1985) ("When Congress so chooses, state actions which it plainly authorizes are invulnerable to constitutional attack under the Commerce Clause."); *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408

(1946).

No less flawed is General Motors' equal protection claim. Because natural gas utilities and marketers engage in fundamentally different businesses, sell fundamentally different products -- one sells a naked commodity, the other sells a commodity plus the delivery service -- and have fundamentally different obligations to the public, Ohio acted rationally in regulating and taxing them differently.

ARGUMENT

I. OHIO'S REGULATION OF NATURAL GAS PUBLIC UTILITIES AND MARKETERS DOES NOT VIOLATE THE DORMANT COMMERCE CLAUSE.

By its terms, the Commerce Clause is a grant of congressional authority. It provides that "Congress shall have Power . . . [t]o regulate Commerce . . . among the several States." U.S. Const., art. I, § 8, cl. 3. Over time the Court has interpreted the Clause to contain a negative component as well -- to mean that, even when Congress does not exercise its plenary authority over interstate commerce, the Clause nonetheless restricts state regulations that interfere with interstate commerce.

Such "dormant" commerce clause challenges to state tax regulations, the Court has held, are assessed under a four-part test: (1) does the regulation apply to an activity with a substantial nexus to the regulating state; (2) is the regulation fairly apportioned; (3) does the regulation discriminate against interstate commerce; and (4) is the regulation fairly related to services provided by the state? *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 287

(1977).

In this instance, General Motors does not dispute three aspects of the *Complete Auto* test. It thus agrees that the tax has a "substantial nexus" to Ohio, is "fairly apportioned," and is "fairly related" to services provided by the State. General Motors instead argues solely under the third prong of the *Complete Auto* test -- that the tax discriminates against commerce. The automotive giant is wrong in doing so.

A. This 62 Year Old Tax Exemption Does Not Impermissibly Discriminate Against Interstate Commerce.

No cognizable theory under the dormant Commerce Clause prevents Ohio from enforcing this venerable tax exemption. The exemption does not have a discriminatory purpose; it does not facially discriminate between similarly situated in-state and out-of-state businesses; and it does not disproportionately burden interstate commerce. *See Amerada Hess*, 490 U.S. at 75-76.

1. Ohio Plainly Did Not Intend to Discriminate Against Interstate Commerce When It Passed This Tax Exemption in 1934.

The sales tax exemption under attack is not new. It was enacted in 1934 as part of the same bill that established Ohio's first sales tax. 1934 Laws of Ohio, 115 Pt. II, 306, 307-08 (1934). The initial legislation thus created a generally applicable sales tax and a generally applicable exemption for all purchases from public utilities of natural gas, water, electricity, and other utility services. *Id*. The twin purpose of the exemption was to account for the gross

receipts tax that public utilities already paid on accumulated sales of their services, and to avoid imposing a sales tax on each individual purchase which would at best be redundant and at worst a form of double taxation. *See Haefner v. City of Youngstown*, 68 N.E.2d 64, 67 (1946) ("the whole legislative course shows an intent to avoid double taxation of receipts whether they come from sales proper or are the 'gross receipts' of utilities"); *id.* ("the exemptions . . . are in keeping with a legislative policy of excepting from the sales tax proper sales already taxed in the same or a similar way"). The substance of the exemption has not changed during the 62 years since it was enacted.

Under these circumstances, the exemption plainly was not designed to discriminate against interstate commerce. It was enacted long before the supposed objects of discrimination (independent marketers) came into existence, and thus long before the Ohio legislature could even conceive a discriminatory motive. At the time the tax exemption was enacted, all natural gas was sold through public utilities and thus all natural gas sales were exempt from sales and use tax. Only the broadest conception of an "ingenious" discriminatory motive, *see Best & Co. v. Maxwell*, 311 U.S. 454, 455-56 (1940), could condemn legislation in this situation. The law, in short, does not have a discriminatory motive, as General Motors seems to concede. G.M. Br. 17 n.14.

2. The Tax Exemption Does Not Facially Discriminate Against Interstate Commerce.

Nor do the unintended consequences of the exemption rise to the level of facial discrimination. In attempting to meet its "burden" of showing such discrimination, *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979), and of invoking the

"virtually *per se*" rule of unconstitutionality, *Oregon Waste Sys., Inc. v. Department of Envtl. Quality*, 114 S.Ct. 1345, 1347 (1994); *see* G.M. Br. 17, General Motors understandably does not proceed on the theory that the statute as enacted in 1934 discriminated on its face. Instead, General Motors argues that the discrimination arose as a matter of historical accident. Once marketers were able to sell natural gas directly to Ohio consumers, the argument goes, facial discrimination sprang into existence when Ohio did not immediately extend the exemption to unregulated marketers. This truly dormant theory of interstate commerce discrimination, however, does not accord with precedent, fact or common sense.

Two fundamental principles allow Ohio to weather this claim. In the first place, the rule of "virtually *per se*" invalidity is not implicated when "there is no explicit discriminatory design" in the words of the statute. *Amerada Hess*, 490 U.S. at 76. In the second place, facial discrimination does not exist unless the State law "imposes a greater burden on out-of-state [companies] than it does on *similarly situated* [in-state companies]." *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 88 (1987) (emphasis added). There thus is "no 'iron rule of equality' between taxes laid by a State on different types of business." *Alaska v. Arctic Maid*, 366 U.S. 199, 205 (1961) (citation omitted) (allowing differential treatment of fish processed by freezer ships and fish processed by local canneries). *See also Associated Indus. of Mo. v. Lohman*, 114 S. Ct. 1815, 1825 n.5 (1994) (requiring comparison between "substantially equivalent events" in order to "avoid[] being drawn into an amorphous inquiry that involves balancing incommensurate burdens imposed on disparate activities throughout the complex structure of a State's tax system") (internal quotation omitted); *Kraft General Foods v. Iowa Dept. of Revenue and Finance*, 505 U.S. 71, 80-81 (1992) (requiring

comparison between companies who are "most similarly situated") (citation omitted); *Dumbar-Stanley Studios v. Alabama*, 393 U.S. 537 (1969) (allowing differential tax treatment of traveling photographers and photographers operating out of fixed locations).

Illustrating these principles are *Amerada Hess*, 490 U.S. 66 (1989) and *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978). In *Amerada Hess*, the Court held that New Jersey's differential tax treatment of oil producers and retailers, which were both engaged in direct sales of oil, was not facially discriminatory. "Whatever different effect the [challenged regulation] may have on these two categories of companies," the Court held, "results solely from differences between the nature of their businesses, not from the location of their activities." 490 U.S. at 78. And that was true even though the tax benefit at issue was denied to a group of companies -- oil producers that market their oil -- located exclusively out of state. *Id.* at 77-78.

Exxon is to the same effect. At issue was a Maryland statute that prohibited oil producers or refiners from operating retail service stations in the State and that required them to extend price reductions uniformly to all retail stations they supplied. Even though the burden of the statute fell solely on out-of-state producers and refiners and even though the statute benefitted in-state independent retailers, the Court found no discrimination. The statute, the Court held, had "no demonstrable effect whatsoever on the interstate flow of goods" -- and thus no discriminatory effect on interstate commerce -- because, as here, "[t]he sales by independent retailers are just as much a part of the flow of interstate commerce as the sales made by the refiner-operated stations." *Exxon*, 437 U.S. at 126 n.16.

Much like the above cases, General Motors cannot

establish "explicit" facial discrimination or discrimination between "similarly situated" companies and "substantially equivalent" sales.

a. No "Explicit Discrimination" Appears on the Face of the Statute.

General applicability of exemption. On its face, the statute bears none of the hallmarks of facial discrimination. The law grants a generally-applicable exemption, and extends the benefit not just to natural gas public utilities but to all public utilities -- whether they provide telephone services, electricity, water or in this instance natural gas. That in itself ought to be enough to show that the "explicit" design of the law is to treat a uniquely regulated class of businesses as one, just like other tax and regulatory provisions of the Ohio Revised Code. Nothing about the language of such a statute, or the general division between regulations for public utilities and other businesses, shows discrimination against a discrete group of out-of-state brokers of natural gas.

No discrimination based on origin of goods. The statute likewise does not draw any distinctions based on where the natural gas originated. Natural gas produced in Texas is as apt to obtain the exemption as gas produced in Ohio. What matters is who retails the commodity -- a company that chooses to own and operate distribution equipment and therefore become regulated as a public utility or a company that does not and therefore remains an unregulated marketer. Under these circumstances, whether commerce in gas is interstate or intrastate is irrelevant under Ohio tax law. The salient distinction is between public utilities and marketers. The Court is "not, therefore, confronted here with the type of differential tax treatment of interstate and intrastate commerce that the Court has found in other 'discrimination' cases." *Commonwealth Edison v.*

Montana, 453 U.S. 609, 618 (1981).[2]

No geographic barriers to becoming a public utility or marketer. The statute also does not make it more difficult for companies headquartered out-of-state to become members of one or the other regulated class. No geographic lines or preferences are drawn. In point of fact, the question whether to live under one set of rules or another has nothing to do with geography or local favoritism. It initially has to do with whether the business wishes to sell just one thing (a naked sale of natural gas) or two things (a sale of natural gas together with the service of delivering the gas through owner-operated pipelines). And it ultimately has to do with whether the business wishes to live under a regime of heavy

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[2] The absence of any discrimination based on the origin of the natural gas distinguishes this regulation from the laws at issue in virtually all of the facial discrimination cases relied on by General Motors. *See, e.g., West Lynn Creamery, Inc. v. Healy*, 114 S. Ct. 2205 (1994) (Massachusetts subsidy provided to in-state milk producers but not to out-of-state producers); *Oregon Waste Sys., Inc. v. Department of Envtl. Quality*, 114 S. Ct. 1345 (1994) (Oregon charged higher disposal fee for out-of-state solid waste than in-state solid waste); *Fort Gratiot Sanitary Landfill v. Michigan Dep't of Natural Resources*, 504 U.S. 353 (1992) (law permitted county landfill operators to refuse to accept solid waste from outside the county); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 271 (1984) (Hawaii exemption "applie[d] only to locally produced beverages"); *Polar Ice Cream and Creamery Co. v. Andrews*, 375 U.S. 361 (1964) (Florida law required local milk processor to purchase milk requirement from producers within a four-county marketing area); *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951) (Madison, Wisconsin ordinance prohibited the sale of pasteurized milk in the city unless it had been pasteurized "within a radius of five miles" from downtown); *Brimmer v. Rebman*, 138 U.S. 78 (1891) (Virginia imposed tax on meat slaughtered 100 miles or more from the place of sale).

regulations or a regime of no regulations.

No geographic preference for in-state marketers. Ohio denies all marketers, whether in-state or out-of-state, the benefits of the exemption, just like it does with respect to most businesses that sell tangible personal property. Thus, a sales tax payment results if General Motors purchases natural gas from an Ohio-based marketer, and a use tax payment results if it purchases natural gas from an out-of-state marketer. *See* R.C. § 5739.02. The only difference is that the legal incidence of tax changes because the consumer pays the one (the use tax) while the seller pays the other (the sales tax). The two taxes, this Court has properly recognized, do not discriminate against interstate commerce. *Fulton Corp. v. Faulkner*, 116 S. Ct. 848, 854 (1996).

That Ohio denies the exemption to in-state marketers and to virtually all industrial consumers of natural gas in the State offers one more piece of statutory evidence that the law is non-discriminatory. "The Court generally defers to health and safety regulations because 'their burden usually falls on local economic interests as well as other States' economic interests, thus insuring that a State's own political processes will serve as a check against unduly burdensome regulations.'" *C & A Carbone, Inc. v. Town of Clarkstown*, 114 S. Ct. 1677, 1689 (1994) (O'Connor, J., concurring) (quoting *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 444 n.18 (1978)). Indeed, "[t]he existence of major in-state interests adversely affected by the Act is a powerful safeguard against legislative abuse." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 473 n.17 (1981).[3]

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[3] Not just Ohioans, but citizens of all States, would be unlikely to suffer if the Ohio sales tax exemption were adopted in every State in the country. That, too, undermines General Motors' claim. "[T]he practical effect of [the exemption] must be

In the end, the statute contains none of the telltale signs of facial discrimination -- be it a tariff, an embargo, local "protectionism," "economic Balkanization," or any other explicit favoritism for intrastate over interstate interests. On its face, the law grants a generally-applicable exemption from a generally-applicable tax, and does so on the basis of a distinction (between public utilities and other businesses) that is as wide-spread among the States as it is time-honored. *See* State Amicus Br. 1-4. Such a law simply does not discriminate against interstate commerce.

b. Differential Treatment of Different Businesses and Different Transactions Does Not Constitute Facial Discrimination.

In response, General Motors advances essentially one theory of discrimination. The Ohio regulatory scheme is facially discriminatory, General Motors submits, because the allegedly favored class (public utilities) is defined by control of pipelines in Ohio and distribution of gas through them. The argument is at once creative but at the same time implausible, and in the end fails to show any "explicit discriminatory design." *Amerada Hess*, 490 U.S. at 76. The key flaw is that this "geographic distinction" does not

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evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of the other States and what effect would arise if not one, but many or every, State adopted similar legislation." *Wyoming v. Oklahoma*, 502 U.S. 437, 453-54 (1992) (quoting *Healy v. Beer Institute*, 491 U.S. 324, 336 (1989)). In view of the States' wide-spread tradition of separately regulating intrastate sales and distribution of natural gas, it is too late in the day to argue that a State law respecting that tradition would somehow impair the stream of commerce.

benefit an in-State entity at the expense of similarly situated "counterparts . . . in other States." *Oregon Waste*, 114 S. Ct. at 1350. *See CTS Corp.*, 481 U.S. at 88.

Deregulated marketers are not "similarly situated" "counterparts" of regulated utilities. Each group has separate obligations and lives under exceedingly different regulations. The tax exemption at issue in this case thus plays but a small part in the broad regulatory scheme that has long treated public utilities differently from other businesses -- in matters both of taxation and other regulations. The two entities sell natural gas differently, buy natural gas differently, price natural gas differently, and treat customers differently.

No less than General Motors itself has acknowledged this fundamental distinction through its conduct in this case. The car company entered into contracts that terminated as a matter of law if any of the marketers became regulated as utilities. J.A. 37-38. That fact, better than any legal argument, illustrates the difference in kind between the two entities and General Motors' ultimate design to reap the benefits but not the burdens of utility status.

Utilities are different from marketers in another important respect. They operate as "natural monopolies" and deliver an essential commodity that the public has a statutory right to demand. *See* Peter W. Huber, et al., *Federal Telecommunications Law*, 9.1, at 423-28 (1992). Unlike marketers and other businesses, utilities participate in a distribution system that contains a finite supply of pipeline equipment. Because States understandably wish to have just one set of water pipes, electric wires or pipelines, as the case may be, criss-crossing their territory, they limit the supply of this equipment and heavily regulate its owners. Richard J. Pierce, Jr., *The State of the Transition to Competitive*

Markets in Natural Gas and Electricity, 15 Energy L.J. 323, 328 (1994). Even after federal deregulation, this feature of public utilities will remain. At the same time, utilities also provide a product and distribution service that Ohio citizens have a right to obtain on demand. *See* R.C. § 4905.22 (imposing an "obligation to serve" the public); *Motor Cargo, Inc. v. Board of Township Trustees*, 117 N.E.2d 224, 226 (Summit Co. C.P. 1953) ("[T]he principal determinative characteristic of a public utility is that of service to, or readiness to serve an indefinite public . . . which has a legal right to demand and receive its services or commodities.") Because marketers, by contrast, simply broker sales and do not undertake physical delivery to customers on demand, there is no equivalent reason to regulate them like utilities. They simply do not undertake the yoke of utility status and quite fairly do not share in its benefits.

Nor is Ohio's separate taxation and regulation of utilities a recent innovation. All 50 States and the District of Columbia separately regulate the business of local natural gas distribution. *See* State Amicus Br. 1 n.1. And 31 States have separate taxation structures for public utilities. *Id.* at 2-3 n. 2. Moreover, for nearly as long as the dormant Commerce Clause has been a feature of constitutional law, *see Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), Ohio has regulated utilities differently from other businesses, *Cooper v. Williams*, 4 Ohio (Hammond) 253 (1831).

Fully recognizing the legitimacy of this distinction, Congress itself has given the States broad authority to make this precise regulatory classification. Under 15 U.S.C. § 717(c), States have explicit authority to regulate natural gas utilities. No such federal legislation applies to marketers.

Both before and after the passage of this federal legislation, moreover, this Court has acknowledged the

unique status of public utilities.

> Since carriers and other utilities with the right of eminent domain, the use of public property, special franchises or public contracts, have many points of distinction from other businesses, including relative freedom from competition, especially significant with increasing density of population and municipal expansion, these public service organizations have no valid ground by virtue of the equal protection clause to object to separate treatment related to such distinctions. Carriers may be treated as a separate class . . . and, as such, taxed differently or additionally.

New York Rapid Transit Corp. v. City of New York, 303 U.S. 573, 579 (1938). For similar reasons, the Court recently reaffirmed that "the regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States." *New Orleans Public Service, Inc. v. City of New Orleans*, 491 U.S. 350, 365 (1989) (citation omitted).

Against this economic, legislative, and historical backdrop, the dormant Commerce Clause does not suddenly compel Ohio to abandon this dichotomy. It does not put Ohio to the all-or-nothing-at-all choice of regulating every retailer in the natural gas market the same, whether they operate distribution equipment or not. Neither does it compel the lesser alternative that General Motors seeks here -- namely, permitting marketers to slice off the benefits of being a public utility but not the burdens. Ohio permissibly requires its companies to take the bitter with the sweet. In the end, marketers and utilities may well distribute the same

commodity. But they clearly are not "similarly situated" "counterparts" of one another when it comes to establishing a case of facial discrimination and harvesting the benefits of the rule of "virtually *per se*" invalidity that allegedly comes with it.

In-state and out-of-state utilities are not similarly situated counterparts. Despite the well-established distinction between utilities and other businesses, General Motors posits that facial discrimination still exists because Ohio does not extend the exemption "to purchases from out-of-state public utilities." G.M. Br. 18. This hypothetical inconsistency, however, does not help the car company.

As an initial matter, the same defect that condemns General Motors' marketer comparison condemns this one. When all is said and done, there simply is no out-of-state analogue to an Ohio utility and thus no similarly situated group to which Ohio could extend this exemption. True, out-of-state utilities operate pipelines. True also, they use pipelines to deliver natural gas and live under heavy regulations in doing so. But that is not to say that these aspects of their business have any relevance to a natural gas transaction with an Ohio consumer. If, for example, an Indiana utility chooses to broker a natural gas sale to an Ohioan, it does so in the capacity of a marketer, not in the capacity of a utility. The Indiana utility merely sells a naked commodity to an Ohio consumer, but relies on others to distribute the gas, relies on other pipelines for doing so, and accordingly is spared the heavy Ohio (and Indiana) regulation that comes with the territory of owning and using distribution equipment in a State.

Ohio has long recognized, moreover, that utilities may operate in a "'dual capacity,'" and thus may be regulated differently in each capacity. *See General Am.*

Transp. Corp. v. Limbach, 473 N.E.2d 814, 817 (Ohio 1984) (subjecting "dual capacity" enterprise to general business regulations when operating as a manufacturer and to utility regulations when operating as a utility). Thus, an out-of-state utility may act as a marketer and thus free itself of State regulatory burdens; or it may act as a utility and take on those burdens. The two transactions are not "substantially equivalent events" and treating them separately is the only way to "avoid[] being drawn into an amorphous inquiry that involves balancing incommensurate burdens imposed on disparate activities throughout the complex structure of a State's tax system." *See also Associated Indus. of Mo. v. Lohman*, 114 S. Ct. 1815, 1825 n.5 (1994) (citation omitted). In sum, while Ohio presumably has authority to extend this tax exemption to out-of-state utilities, nothing in the Commerce Clause compels it to do so.

General Motors, in any event, cannot rely on its out-of-state utility hypothetical. Perhaps more importantly, Ohio's hypothetical treatment of out-of-state utilities is just that -- a conjured vision of discrimination that has no place in a facial challenge, no support in the record and no foundation in Ohio law. Just three terms ago, the Court reminded taxpayers that "we have never deemed a hypothetical possibility of favoritism to constitute discrimination that transgresses constitutional commands." *Associated Indus.*, 114 S. Ct. at 1824. General Motors did not meet any of its natural gas needs through out-of-state utilities in this instance, and thus did not challenge the validity of the statute as applied to that situation. Under these circumstances, the carmaker cannot invoke the specter of discrimination in some other setting in order to make up for the utter lack of discrimination here. *See id.*; *United States v. Salerno*, 481 U.S. 739, 745 (1987); *Roemer v. Board of Public Works*, 426 U.S. 736, 761 (per curiam) (1976) ("It has not been the Court's practice, in considering

facial challenges to statutes of this kind, to strike them down in anticipation that particular applications may [be] unconstitutional.").

That General Motors offers no evidentiary or legal foundation for its argument confirms the wisdom of this rule. Nothing on the face of the statute indicates that Ohio draws a line between in-state and out-of-state utility sales. And nothing obtained during discovery or at the hearing in this case supports the assumption either. It may well be that under some circumstances (or even under all circumstances) Ohio would extend the exemption to out-of-state utilities. Indeed, the one Ohio case to consider this issue suggests that General Motors' assumption is wrong. At issue in *Carnegie Natural Gas Company v. Tax Comm'r*, Case No. 94-K-526, Ohio Bd. Tax App. (reported in Ohio Tax Rep. (CCH) at ¶ 402-254) (Nov. 17, 1995) was whether a Pennsylvania public utility should be regulated as an Ohio utility when selling natural gas to an Ohio consumer. *Id.* at 3-7, 9. The Board of Tax Appeals concluded that the company was an Ohio utility under R.C. § 5727.01, potentially making it eligible for the tax exemption at issue in this case.

The real point, however, is not that Ohio would or would not extend the exemption to an out-of-state utility. It is that General Motors did not purchase from out-of-state utilities in this instance and thus cannot deploy a case of hypothetical discrimination to shore up its claim that the dormant Commerce Clause forbids Ohio from taxing utility and marketer sales differently.

3. Ohio's Regulatory Scheme Does Not Place a Disproportionate Burden on Interstate Commerce.

For many of the same reasons that General Motors cannot establish facial discrimination here, it cannot show that the Ohio regulations place an undue burden on interstate commerce. While the Court has held that a facially neutral statute may impermissibly burden interstate commerce in application, no such showing has been made in this instance. *See Pike v. Bruce Church Inc.*, 397 U.S. 137, 142 (1970) ("Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."); *Amerada Hess*, 490 U.S. at 75.

First, it is not even clear that General Motors is pressing this argument. It did not argue below -- and does not appear to be arguing now -- that Ohio has offended the dormant Commerce Clause on this ground.

Second, even if General Motors purports to be making this argument, it has not established any factual predicate for doing so. *See Associated Indus.*, 114 S.Ct. at 1824 (actual, not "hypothetical," discrimination violates the Commerce Clause); *Norton Co. v. Department of Revenue*, 340 U.S. 534, 537 (1951) ("a taxpayer claiming immunity from a tax has the burden of establishing his exemption"). The record is completely barren of evidence that this particular tax exemption, or Ohio's general segregation of the regulations applicable to utilities and marketers, has caused an undue burden on interstate commerce.

Finally, what evidence there is leads to a contrary

conclusion. Far from impeding commerce, Ohio's overall regulation of marketers and utilities has allowed marketers to corner the market for industrial sales of natural gas. J.A. 194. At the same time, even though marketers have been able to enter the residential market for some time, they have not done so. J.A. 195. The reason, however, has nothing to do with this tax exemption and everything to do with the requirement that sellers in this market need to guarantee a firm back-up supply for meeting the gas needs of individual consumers. *See* Joseph Fagan, *From Regulation to Deregulation: The Diminishing Role of the Small Consumer Within the Natural Gas Industry*, 29 Tulsa L. Rev. 707, 723-27 (1994).

At a more general level, no tenable argument exists that public utilities receive easier treatment than unregulated marketers. *See Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 69 (1963) (Court "must take the whole scheme of taxation into account"); *Gregg Dyeing Co. v. Query*, 286 U.S. 472, 481-82 (1932). Consider the stark differences in tax treatment between the two entities. Utilities pay property taxes on 88% of the true value of their taxable property, R.C. § 5727.111, while marketers pay tax based on 25% of the true value of their taxable property, R.C. § 5711.22. Utilities pay a gross receipts tax of 4.75% and cannot deduct ordinary and necessary expenses in doing so, R.C. § 5727.38, while marketers pay a 5-7% sales and use tax, a high percentage of which is deducted under Ohio's direct-use-in-manufacturing exemption, R.C. § 5739.02(B)(15). Utilities are not permitted to charge more than cost on each sale, while marketers are permitted to make an unlimited profit on each sale and thus must pay a franchise tax on profits (if incorporated) or an income tax (if not). R.C. §§ 5733.01, 5747.02. Utilities must pay a tax assessment for the expenses of the PUCO and the Ohio Consumer's Council, while marketers pay no such assessment. R.C.

§ 4905.10; R.C. § 4911.18. As the amicus brief of one of the participants in this market illustrates, a comparison between the effective rate of taxation for the two groups shows that marketers are the favored class. *See* Brief of Columbia Gas of Ohio, 19-23.

The disproportionate tax burden assessed against utilities, moreover, is just the beginning of the regulatory net that ensnares utilities but not marketers. Both the FERC and the PUCO regulate natural gas public utilities, but not marketers. 15 U.S.C. § 717, *et. seq.*; R.C. Title 49. In light of these regulations: (1) utilities cannot terminate service to a customer for non-payment or any other reason, except in extremely limited circumstances, R.C. §§ 4933.12, 4933.122, 4933.123, while marketers may terminate service whenever they see fit subject only to the terms of their contract with each customer; (2) utilities are restricted in their ability to correct for underbilling, while marketers are not, R.C. § 4933.28; (3) utilities' rates and their method of operation are governed by the PUCO during a costly hearing process, while marketers are free to charge whatever the market will bear, R.C. §§ 4909.15, 4905.37; (4) utilities must make public all information pertaining to their operations, contracts and sales efforts and provide such information on demand to the PUCO and the Ohio Consumer's Counsel, while marketers do not, R.C. §§ 4905.05, 4905.06, 4905.15, 4905.16, 4905.30, 4905.37, 4911.16; (5) utilities must treat similar customers equally, while marketers may negotiate the best deal they can obtain with each customer, R.C. §§ 4905.33, 4905.35; (6) utilities must receive approval from the PUCO before issuing securities, bonds, dividends, or even entering into a contract, while marketers need no such approval, R.C. §§ 4905.31, 4905.40, 4905.41, 4905.46(A), 4905.48; (7) utilities must submit and obtain hearing-mandated approval of a long-term forecast to the PUCO detailing their future demand for and

supply of gas, while marketers need not, R.C. § 4935.04; and (8) utilities must submit an annual report to the PUCO concerning their operations and finances, while marketers need not, R.C. § 4905.14.

All things considered, the cumulative regulatory and tax burdens placed on public utilities far outweigh those placed on marketers. There simply is no undue burden on interstate commerce in this instance.[4]

B. Congress Has Explicitly Permitted Ohio to Treat Natural Gas Utilities As A Separate Regulatory Classification.

Even if there were impermissible discrimination in this instance (which there is not), General Motors' Commerce Clause claim still would have to be rejected. Congress has been far from dormant in this area, and has authorized the States to draw the very classification at issue in this case. Since 1938, when the federal government first began regulating natural gas, Congress has expressly granted the States authority to regulate intrastate distribution of this commodity. Because Ohio has simply adhered to that federal classification in regulating sales by utilities differently from sales by other distributors, the dormant Commerce Clause

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[4] Whether one views this as a facial discrimination challenge or an undue burden challenge, any finding of discrimination "is demonstrably justified by a valid factor unrelated to economic protectionism." *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 274 (1988). *See West Lynn Creamery, Inc. v. Healy*, 114 S. Ct. 2205, 2211 (1994). Because Ohio's health, safety and economic interest in regulating utilities separately from other businesses predated even the potential for discrimination in this instance, there can be little doubt that the State's interest is "unrelated to economic protectionism."

does not restrict its actions in this instance. *See, e.g*, *Northeast Bancorp, Inc. v. Board of Governors*, 472 U.S. 159 (1985); *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 423 (1946).[5]

The dormant Commerce Clause does not independently restrict State action when Congress authorizes the States to regulate an area of interstate commerce. In that situation, there is no danger that the concern underlying the dormant Commerce Clause -- State "usurpation" of the power to regulate interstate commerce "conferred by the Constitution upon the Congress of the United States," *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 271 (1984) (internal citation omitted) -- will present itself. Accordingly, "[w]hen Congress so chooses, state actions which it plainly authorizes are invulnerable to constitutional attack under the Commerce Clause." *Northeast Bancorp*, 472 U.S. at 174.

In this instance, Congress has firmly placed its stamp of approval on the regulatory classification that Ohio has drawn. Congress has explicitly granted the States exclusive jurisdiction to regulate entities that receive gas in interstate commerce at the borders of the State and that sell to ultimate consumers within the State. 15 U.S.C. § 717(c). In full, section 717(c) provides:

The provisions of this chapter shall not apply to any

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[5] Of course, this does not mean that Ohio is immune from attack on other constitutional grounds, such as equal protection. *See Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985) (even though plaintiff could not claim Alabama discriminated against interstate commerce through its insurance regulations in light of the McCarran-Ferguson Act, 59 Stat. 33, 15 U.S.C. § 1011, *et seq.*, it was fully entitled to bring an equal protection challenge to those regulations).

> person engaged in or legally authorized to engage in the transportation in *interstate commerce* or the sale in interstate commerce for resale, of natural gas received by such person from another person *within or at the boundary* of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, *provided that the rates and service of such person and facilities be subject to regulation by a State commission.* The matters exempted from the provisions of this chapter by this subsection are declared to be matters primarily of local concern and subject to regulation by the several States. A certification from such State commission to the Federal Power Commission that such State commission has regulatory jurisdiction over rates and service of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power or jurisdiction.

Id. (emphasis added).

The circumstances leading to the passage of the statute confirm its applicability here. Enacted in 1953, the law represented a direct response to the Court's decision in *Federal Power Comm'n v. East Ohio Gas*, 338 U.S. 464 (1950). There the Court for the first time allowed the federal commission to regulate intrastate distribution of natural gas by local public utilities. *Id.* at 472; *see also* H.R. Rep. No. 899, S. Rep. No. 817, 83d Cong., 2d Sess. (1953), *reprinted in* 1954 U.S.C.C.A.N. 2101, 2102 (*East Ohio Gas* allowed the federal commission to regulate public utilities "engaged in the distribution of natural gas whose operations take place wholly within a single State and which can be completely regulated by the respective States"). As

a direct result of *East Ohio Gas*, Congress "eliminated [federal and State regulatory] duplication by leaving the jurisdiction over these companies *exclusively in the states, as always has been intended.*" *See* H.R. Rep. No. 899, S. Rep. No. 817, 83d Cong., 2d Sess. (1953), *reprinted in* 1954 U.S.C.C.A.N. 2102 (1954) (emphasis added); *id.* ("The purpose of this legislation is to clarify the Natural Gas Act by further defining the limits of the Federal Power Commission's jurisdiction with respect to operations of companies engaged in the local distribution within a State of out-of-State natural gas which has been received by such a company at or within the State borders.").

In addition to the plain language of the statute and the revealing circumstances leading to its adoption, this Court's cases recognize the bright jurisdictional line drawn by this provision between the State's authority to regulate intrastate distribution through their public utilities on the one hand and the FERC's ability to regulate interstate transportation on the other. *See, e.g., Arkansas Electric Coop. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 392-93 (1983); *Federal Power Comm'n v. Southern Cal. Edison Co.*, 376 U.S. 205, 211-17 (1964); *Panhandle Eastern Pipeline Co. v. Michigan Pub. Serv. Comm'n*, 341 U.S. 329, 337 (1951).

Ohio's regulation of natural gas public utilities falls well within these parameters. All natural gas received by Ohio public utilities is delivered to consumers within the State. *See* R.C. § 4905.03. And the Ohio Public Utility Commission is statutorily authorized to regulate the acquisition of natural gas, the rates charged for natural gas and the delivery of natural gas by these utilities. *See* R.C. §§ 4905.02, 4905.03.

Nor can General Motors escape the consequences of this congressional action by arguing that it has challenged a State

tax rather than a State regulation. The Court has recognized that the power to tax is "one of the forms of regulation," *Pacific Tel. and Telegraph Co. v. Tax Comm'n*, 297 U.S. 403, 413 (1936), and thus has consistently found that taxing authority is a subset of regulatory authority, *see North Dakota v. United States*, 495 U.S. 423, 434 (1990) (listing state tax laws as a form of regulation along with licensing provisions, contract laws and street regulations). Plainly, a grant of congressional authority to establish a separate regulatory classification for natural gas utilities encompasses the power to respect that classification by taxing such entities separately.

In the last analysis, Congress has given Ohio and the other States exclusive jurisdiction to regulate intrastate distribution of natural gas. All Ohio has done here is exercise that grant of authority and respect the very regulatory line that Congress has drawn: It separately classifies, regulates and taxes those participants in the natural gas market that engage in "transportation" of natural gas within "the boundary of a State." Other participants in the market, be they interstate pipelines, marketers, producers or anyone else, are treated differently because (as Congress itself has recognized) they are different. The dormant Commerce Clause simply does not prohibit such legitimate State action. Indeed, the rhetoric of the prohibition -- that it was designed to prohibit "economic Balkanization" and "local protectionism" -- makes little sense in the context of the intrastate distribution market, which Congress itself has Balkanized and which Congress itself has said may be entirely "protectionist." In short, whether interstate commerce discrimination occurs here or not, General Motors' dormant Commerce Clause challenge should be rejected.

II. OHIO'S REGULATION OF NATURAL GAS UTILITIES AND MARKETERS DOES NOT DENY EQUAL PROTECTION.

Just as Ohio has not violated the Commerce Clause through its regulatory distinction between natural gas utilities and marketers, neither has it violated the Equal Protection Clause by establishing two very-different sets of regulations for two very-different sets of businesses. Much like the Commerce Clause, this provision limits discrimination only between two "similarly circumstanced" entities, and gives the States substantial discretion in drawing these classifications. *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

Judicial deference is at its height when a plaintiff attacks a tax classification on equal protection grounds. "[I]n taxation, even more than in other fields, legislatures possess the greatest freedom in classification." *Madden v. Kentucky*, 309 U.S. 83, 88 (1940). "Where the public interest is served one business may be left untaxed and another taxed, in order to promote the one or to restrict or suppress the other." *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 512 (1937) (internal citations omitted). For these reasons,

> it has repeatedly been held and appears to be entirely settled that a statute which encourages the location within the State of needed and useful industries by exempting them, though not also others, from its taxes is not arbitrary and does not violate the Equal Protection Clause of the Fourteenth Amendment. Similarly, it has long been settled that a classification, though discriminatory, is not arbitrary or violative of the Equal Protection Clause of the Fourteenth Amendment if any state of facts reasonably can be conceived that would sustain

it.

Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 528 (1959) (internal citations omitted).

Measured against this modest test, Ohio's regulatory distinction between natural gas marketers and natural gas public utilities clearly passes. In exercising its police power in this area, as previously shown, Ohio has placed certain public service obligations on utilities that it does not place on marketers in view of the unique public services that utilities perform. The heavy regulations applicable to one group but not to the other by themselves supply a rational basis for establishing a system of different tax benefits and burdens for each group and for each group's customers.

General Motors offers several responses to these arguments, all unpersuasive. It initially contends that the tax scheme is "irrational" because Ohio taxes "identical" property differently depending on whether the seller is a marketer or utility. G.M. Br. 30. Once there is a rational basis for regulating utilities and marketers differently, however, it follows that a State can respect that difference in its sales regulations -- whether the two businesses sell the same goods or not.

Next, General Motors alternatively argues that rational basis scrutiny is not appropriate here. "[H]eightened judicial scrutiny" under the Equal Protection Clause is required, the company claims, because the classification "implicates other constitutional rights" -- here, alleged rights under the dormant Commerce Clause. G.M. Br. 30. That is wrong. "Unless a classification trammels *fundamental* personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require

only that the classification be rationally related to a legitimate state interest." *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (emphasis added). *See Gregg Dyeing Co. v. Query*, 286 U.S. 472, 482 (1932). Contrary to General Motors' suggestion, the Court has never endorsed the sweeping proposition that the dormant Commerce Clause creates "fundamental" rights for purposes of equal protection review. Given the array of state laws that presumably "implicate" interstate commerce, moreover, it is difficult to fathom a stopping point for this proposed rule.

Nor do the cases cited by General Motors support this argument. Some of the cases explicitly applied rational basis scrutiny to equal protection claims, *see, e.g., Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 875 (1985), *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359-60 (1973); others did not involve the appropriate standard of review in an equal protection case, *see Dennis v. Higgins*, 498 U.S. 439 (1991) (addressing whether Commerce Clause claims could be brought under section 1983), *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157 (1954) (addressing Commerce Clause challenge); and still others simply illustrated a division within the Court about whether to apply strict scrutiny to equal protection claims implicating the right to travel, *see Attorney General of New York v. Soto-Lopez*, 476 U.S. 898 (1986), *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985), *Williams v. Vermont*, 472 U.S. 14 (1985). On this record, the Ohio Supreme Court correctly rejected General Motors' equal protection claim.

CONCLUSION

For the foregoing reasons, the judgment of the Ohio Supreme Court should be affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

GENERAL MOTORS CORPORATION,
Petitioner,

v.

ROGER W. TRACY, TAX COMMISSIONER OF OHIO,
Respondent.

On Writ of Certiorari to the Supreme Court of Ohio

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Many of the showings made in General Motors' opening brief (GM Br.) are simply not contested in the Tax Commissioner's brief (R. Br.). For instance, the Commissioner makes no effort to defend the Ohio Supreme Court's holding that GM lacked standing to challenge a tax that it paid (Pet. App. 4a), apparently conceding the Ohio court's error. And even when the Commissioner does address GM's arguments, his hodgepodge of responses largely consists of efforts to reargue well-established law, efforts that are wholly insufficient to save the discriminatory tax.

I. THE LEGISLATURE'S INTENT IS IRRELEVANT

The Commissioner argues that the Ohio legislature did not have a discriminatory motive when it first passed the exemption provision. (R. Br. 16-17) We do not understand the relevance of this argument. As GM showed in its opening brief (GM Br. 17 & n.14), this Court has repeatedly held that "a court need not inquire into the purpose or motivation behind a law to determine that *in actuality* it impermissibly discriminates against interstate commerce." *Associated Industries of Mo. v. Lohman,* 114 S. Ct. 1815, 1824 (1994) (emphasis added). A showing of such "discriminatory intent" is always sufficient, but never necessary, to prove a Commerce Clause violation. *Amerada Hess Corp. v. Director, Div. of Taxation,* 490 U.S. 66, 75 (1989). This is so because "the evil of protectionism" is present wherever interstate commerce is disfavored. *Philadelphia v. New Jersey,* 437 U.S. 617, 626 (1978). Thus, just as in *Hunt v. Washington Apple Advertising Comm'n,* 432 U.S. 333, 352 (1977), the Court "need not ascribe an economic protection motive . . . to resolve this case."

II. THE EXEMPTION IS DISCRIMINATORY

The Commissioner does not dispute the well-established rule that where a taxing statute facially discriminates against interstate commerce, a "virtually *per se*" rule of unconstitutionality applies. *Oregon Waste Systems, Inc. v. Department of Environmental Quality,* 114 S. Ct. 1345, 1350 (1994). However, in an effort to prevent GM from "harvesting the benefits of the rule of 'virtually

per se' invalidity" (R. Br. 27), the Commissioner claims that the exemption statute is not facially discriminatory.

That is demonstrably incorrect. As authoritatively construed by the Supreme Court of Ohio, the exemption statute allows a sales and use tax exemption only when natural gas is purchased from a company that "own[s] or operate[s] the transportation and distribution equipment and deliver[s] the natural gas to consumers *in Ohio*." Pet. App. 3a (emphasis added). In other words, the exemption is *only* available when the purchase is made from an Ohio public utility, and even the Commissioner does not seriously contend otherwise.[1] By favoring only purchases made from local public utilities, the statute facially discriminates.

The Commissioner cannot distinguish *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), which, like this case, also involved a sales and use tax exemption for local products. The exemption in *Bacchus* (which applied only to two in-state liquors) violated the Commerce Clause because it was not available to purchases of other liquors, mostly originating out-of-state, which competed with the local liquors. As GM showed in its opening brief (GM Br. 14-15), the Ohio exemption suffers from the same constitu-

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[1] At one point in his brief, however, the Commissioner appears to suggest a different construction of the statute. (R. Br. 29) Citing a decision of the Ohio Board of Tax Appeals, *Carnegie Natural Gas Co. v. Tracy*, No. 94-K-526, Ohio Tax Rep. (CCH) ¶ 402-254 (Ohio Bd. Tax App. 1995), the Commissioner suggests that, "potentially," the exemption statute "may well" extend to purchases of natural gas from out-of-state public utilities. The Multistate Tax Commission (MTC), *amicus curiae* for the Commissioner, more strongly urges this construction of the statute. Of course, the Ohio Supreme Court's construction is binding upon this Court. *E.g., Memorial Hospital v. Maricopa County*, 415 U.S. 250, 256 (1974). The suggestion that purchases from out-of-state utilities might be exempt is also flatly contradicted by the testimony of the Commissioner's representative that "natural gas purchased from an out-of-state seller of natural gas and delivered to a consumer outside the State of Ohio could [n]ever qualify for the exemption." J.A. 88.

tional defect: it "applies only to locally-[sold gas], even though it does not apply to all such products." *Id.* at 271. Thus, the statute here discriminates just like the one struck down in *Bacchus*, because it "appl[ies] exclusively to a localized industry"[2] — local public utilities, and the local purchases made from them.

Nonetheless, the Commissioner offers five arguments in support of his position that the exemption is nondiscriminatory — all of them unsupported.

A. "The Law Grants A Generally-Applicable Exemption"

The Commissioner claims that the exemption is not discriminatory because it is "generally-applicable." (R. Br. 20) By "generally-applicable" the Commissioner plainly does not mean that the exemption applies to all purchases of natural gas; rather, he apparently means that the same statute, Ohio Rev. Code Ann. § 5739.02(B)(7), also provides exemptions for other types of local purchases from other types of local public utilities — "electric compan[ies]," "water-works compan[ies]," and "heating compan[ies]." The Commissioner cannot seriously defend the exemption on the ground that it also favors purchases from local public utilities that distribute electricity, water, and heat.

B. "No Geographic Barriers To Becoming A Public Utility"

The Commissioner also claims that the exemption is nondiscriminatory because it imposes "[n]o geographic barriers to becoming a public utility." (R. Br. 21) The court below authoritatively construed the exemption statute to require the seller to own and operate the delivery equipment "and deliver the natural gas to consumers *in Ohio*" (Pet. App. 3a (emphasis added)) Thus, for a seller to gain such Ohio "public utility" status, it must own and operate delivery and transportation

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[2] *Amerada Hess Corp. v. Director, Div. of Taxation*, 490 U.S. 66, 76 (1989) (discussing *Bacchus*).

equipment *in Ohio*, and deliver gas to consumers *in Ohio*. There is no way for a seller to satisfy this requirement short of moving its operations into Ohio, and becoming a public utility. It has long been established, however, that a state may not use discriminatory taxes "in an attempt to induce 'business operations to be performed in the home State that could more efficiently be performed elsewhere.'" *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388, 406 (1984) (quoting *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 336 (1977)) (internal quotation omitted).

In any event, this "choice" available to sellers of gas does nothing to eliminate the discrimination experienced by gas *purchasers* such as GM. By extending the exemption only to buyers who purchase gas from in-state public utilities, Ohio "forecloses tax-neutral decisions" by gas purchasers. *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. at 331. The exemption provision necessarily has the impermissible effect of encouraging purchasers to shop for their natural gas supplies at home in Ohio, rather than on the interstate market. It "exerts an inexorable hydraulic pressure" on purchasers such as GM to purchase "within the State . . . rather than 'among the several States,'" *American Trucking Ass'ns v. Scheiner*, 483 U.S. 266, 286-87 (1987), and "impos[es] an artificial rigidity on the economic pattern of the industry." *Toomer v. Witsell*, 334 U.S. 385, 404 (1948).

C. "No Discrimination Based On Origin Of Goods"

The Commissioner next claims that "the statute . . . does not draw any distinctions based on where the natural gas originated." (R. Br. 20) We are at a loss to understand this theory. The Commissioner appears to claim that the Commerce Clause would only bar Ohio from discriminating against gas extracted from the ground outside the state and that favoring local sales of gas is

permissible.[3] This argument is without substance. The Clause prohibits discrimination against interstate commerce of all types — it prohibits discrimination against out-of-state goods whether they are produced out-of-state (*e.g., Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263), sold out-of-state (*e.g., Associated Industries of Mo. v. Lohman*, 114 S. Ct. 1815), or shipped from another state. *See, e.g., Westinghouse Electric Corp. v. Tully*, 466 U.S. 388. The Clause also bars discrimination against out-of-state businesses whether they be producers (*e.g., New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 274 (1988)), or sellers (*e.g., Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27 (1980)).

This Court has previously struck down states' efforts to favor businesses that maintain distribution and sales facilities in-state. In *Westinghouse Electric Corp. v. Tully*, this Court held a New York income tax credit, given only for products "shipped from a regular place of business of the taxpayer within [New York]," to be facially discriminatory. 466 U.S. at 393, 406-07 (internal quotation omitted). Similarly, in the use tax cases (*e.g., Associated Industries v. Lohman, supra; Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963)), this Court has established the principle that out-of-state retailers need not maintain sales facilities within the taxing state in order to obtain equal treatment of their goods as compared to their in-state retail competitors.

In short, the Clause is not as narrow as the Commissioner would have it: It prohibits all discrimination "against foreign enterprises competing with local businesses," *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 115 S. Ct. 1331, 1344 (1995), and protects those who choose to purchase goods from out-of-state sellers instead of in-state sellers. *See, e.g., Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. at 72. The Commerce Clause is not limited to barring discrimination against goods "produced" out-of-state.

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[3] The Multistate Tax Commission echos this position in its *amicus* brief. (Multistate Tax Comm'n Br. at 24-26)

D. "Differential Treatment Of Different Businesses And Different Transactions Does Not Constitute Facial Discrimination"

The Commissioner then urges that discrimination is absent because Ohio may favor purchases of gas from local public utilities on the ground that non-utility sellers and local public utilities "are not 'similarly situated'" — the differences resulting from the unique "yoke of utility status." (R. Br. 24, 25; *see generally* R. Br. 18-20, 23-29) This theory also cannot save the statute.

First, the Commissioner erroneously relies, as he does throughout his brief, upon supposed differences between utility and non-utility sellers. But the tax and tax exemption statutes at issue here are plainly sales and use taxes, imposed upon the purchase or use of the commodity, the liability for which falls upon the purchaser or user of the commodity. Like most sales and use taxes, the tax is upon the consumer. Ohio Rev. Code Ann. §§ 5739.02, 5741.02(A). However, the Commissioner erroneously treats the challenged taxes as, somehow, a tax on the *sellers* of natural gas.

This misplaced focus only diverts attention from the proper Commerce Clause inquiry: "In considering claims of discriminatory taxation under the Commerce Clause . . . it is necessary to compare *the taxpayers* who are 'most similarly situated.'" *Kraft General Foods, Inc. v. Iowa Dep't of Rev. & Finance,* 505 U.S. 71, 80 n.23 (1992) (emphasis added) (quoting *Halliburton Oil Well Cementing Co. v. Reily,* 373 U.S. at 71). The Commissioner should know this — he relies on this very language from *Kraft*. (R. Br. 18-19) As GM explained in its opening brief (GM Br. 25), the taxpayers (buyers of natural gas) are similarly situated whether they purchase from local utilities or from non-utilities; the sales transactions are identical; the gas is identical whether sold by a local utility or not; and the gas is delivered through the identical interstate pipelines and local distribution companies. Contrary to the Commissioner's urgings (R. Br. 18), those are plainly "substantially equivalent events" appropriate for

a Commerce Clause inquiry. Only those who refuse to buy from local utilities bear the weight of the tax.[4]

Second, no meaningful distinction between utilities and non-utility gas merchants can be drawn here in any event, because each competes with the other in the market for natural gas. The Commissioner concedes as much when he notes that marketers and utilities both are "retailer[s] in the natural gas market," and urges that Ohio may tax the non-utility purchases to avoid "permitting marketers to slice off the benefits of being a public utility but not the burdens." (R. Br. 26; *see also* R. Br. 1-2, 7, 10-11, 14; Pet. Opp. 11 ("[t]he players in the business of selling natural gas are natural gas marketers and natural gas utilities"))[5] It is difficult to imagine a more blatant argument for the protection of local businesses in a competitive marketplace. This Court has repeatedly held that "the Commerce Clause prohibits economic protectionism — that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state

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[4] The Commissioner's misguided focus on the *sellers* instead of the *taxpayers* affects his analysis of other cases as well. *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69 (1987), upheld an Indiana anti-takeover statute because it did not "impos[e] a greater burden on out-of-state offerors than it does on similarly situated Indiana offerors." *Id.* at 88. Here, in contrast, the tax scheme imposes higher taxes on those who purchase gas out-of-state. Likewise, *Dunbar-Stanley Studios, Inc. v. Alabama*, 393 U.S. 537 (1969), found no discrimination against traveling photographers vis-a-vis photographers with a fixed location because, "[o]n the record before [the Court]," there was no discrimination in fact — the appellant (a travelling photographer) had never paid more than $25 in tax in a given year ($25 was the annual tax paid by fixed-location photographers). *Id.* at 542. In contrast, on the record before the Court here, GM was assessed taxes on its gas purchases which it otherwise would have been exempt from had it purchased from a local public utility.

[5] *See also* J.A. 126, 157, 203; GM Br. 2-3, 23-25; Br. *Amici Curiae* of the Chamber of Commerce of the United States *et al.* at 6-8; Br. *Amicus Curiae* of Columbia Gas of Ohio at 4.

competitors." *New Energy Co. of Indiana v. Limbach*, 486 U.S. at 273-74 (citing *Bacchus Imports, Ltd. v. Dias*, 468 U.S. at 270-73, *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 532-33 (1949), *and Guy v. Baltimore*, 100 U.S. 434, 443 (1880)).[6] "[A] direct commercial advantage to local business," in whatever form, is unconstitutional. *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458 (1959).

Even the Commissioner's own authorities state the principle that the Commerce Clause prohibits such discrimination within competitive markets. He places heavy reliance on *Alaska v. Arctic Maid*, 366 U.S. 199 (1961), for the proposition that there is "no 'iron rule of equality' between taxes laid by a State on different types of businesses." *Id.* at 205 (quoted at R. Br. 18). But the "different types of businesses," in the *Arctic Maid* sense, are those that do not compete with one another. Arctic Maid's freezer ships (which froze fish destined for the cannery) were "different businesses" than the favored freezer ships (which froze fish destined for the retail market in fresh, non-canned fish) because the former "do not *compete with* those who freeze fish for the retail market." *Arctic Maid*, 366 U.S. at 204 (emphasis added). Here, by contrast, the competition between the exempt and the non-exempt sellers is both self-evident as well as established by the record and conceded by the Commissioner.

The Commissioner also relies on *Amerada Hess Corp. v. Director, Div. of Taxation*, 490 U.S. 66, for the proposition that the discrimination in favor of local utility purchases is permissible because it "results solely from differences between the nature of their businesses, not from the location of their activities." 490 U.S. at 78 (quoted at R. Br. 19). In *Amerada Hess*, however, there was no geographic discrimination because the windfall tax

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[6] *See also, e.g., Fulton Corp. v. Faulkner*, 116 S. Ct. 848, 853-54 (1996); *West Lynn Creamery, Inc. v. Healy*, 114 S. Ct. 2205, 2212-13 (1994); *Associated Industries of Mo. v. Lohman*, 114 S. Ct. 1815, 1820 (1994); *C & A Carbone, Inc. v. Town of Clarkstown*, 114 S. Ct. 1677, 1681-82 (1994); *Wyoming v. Oklahoma*, 502 U.S. 437, 454 (1992).

deduction was denied to "oil producers who market their oil" but not to "independent retailers who do not produce oil." *Id.* State lines made no difference to the denial of the deduction.[7] But unlike the statute upheld in *Amerada Hess*, the Ohio exemption *is* dependent upon the utilities' in-state "location of their activities," in particular their sales and delivery activities. (GM Br. 19 n.15 (quotation omitted)) State lines do make a difference here.[8]

Thus, the Commissioner's attempts to draw distinctions between utilities and non-utility sellers of natural gas are irrelevant for Commerce Clause purposes — the taxes are not imposed on those entities, and those entities are "competitors" of one another in the natural gas marketplace, selling precisely the same gas to identical purchasers. The gas is tax-exempt only if it is purchased locally, from a local utility. Such favoritism of local markets and local competitors is impermissible under the Commerce Clause.

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[7] The Commissioner chides GM for "rely[ing] on [an] out-of-state utility hypothetical." (R. Br. 28) But he misses the point of the argument (GM Br. 18-19), which is that the existence of discrimination is confirmed by the fact that the exemption does not apply to *all* purchases from *all* utilities, but only *Ohio* purchases from *Ohio* utilities.

[8] The fact that state lines *are* dispositive of the exemption distinguishes many of the other cases relied upon by the Commissioner. *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 126 (1978) (*see* R. Br. 19), involved a ban on petroleum refiners from owning or operating gas stations in Maryland; "in-state independent dealers [were given] no competitive advantage over out-of-state dealers." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471-72 (1981) (*see* R. Br. 22), upheld a prohibition on milk retailers selling their products in plastic, nonreturnable milk containers, "without regard to whether the milk, the containers, *or the sellers* are from outside the State." (Emphasis added.)

E. "Ohio Denies The Exemption To In-State Marketers And To Virtually All Industrial Consumers Of Natural Gas"

Finally, the Commissioner claims that the exemption is nondiscriminatory because it also applies to some in-state purchases — those from in-state non-utility marketers. (R. Br. 22) But GM has shown (GM Br. 12-17) that this Court has rejected such arguments, without exception, for over 100 years. *Brimmer v. Rebman,* 138 U.S. 78 (1891), and its progeny, hold that a tax which discriminates against interstate commerce cannot be saved on the ground that it also disfavors some in-state commerce. The Commissioner, just as he did in opposing GM's petition for certiorari, seeks to exile these cases to a footnote (*compare* R. Br. 21 n.2 *with* Pet. Opp. 14 n.4), and says that "virtually all" of these cases, as well as others relied upon by GM, involved "discrimination based on the origin" of the goods (R. Br. 21 n.2), which the Commissioner contends is not present here. GM has shown above (pp. 4-5, *supra*) that the Commissioner's "place of origin" argument is meritless, and no other distinction of these cases is offered.

The exemption plainly violates *Brimmer*. It works so that no gas — other than gas sold in Ohio by a local utility — is exempt from tax. This situation is indistinguishable from *Brimmer,* where meat slaughtered more than 100 miles from sale could never be exempt from tax. It is indistinguishable from *Dean Milk Co. v. City of Madison,* 340 U.S. 349 (1951), where milk pasteurized and bottled more than five miles from the city could not be sold. And it is indistinguishable from *Fort Gratiot Sanitary Landfill v. Michigan Department of Natural Resources,* 504 U.S. 353 (1992), where waste from outside the county could not be accepted for processing by the landfill. Plainly, under this Court's precedents, the discrimination is no less obnoxious simply because it is partial.

III. THE DISCRIMINATION CANNOT BE JUSTIFIED

Having failed to show that the exemption is nondiscriminatory, the Commissioner offers two justifications in hopes of overcoming the "virtually *per se*" rule of invalidity. It is the Commissioner's burden to prove the existence and validity of these justifications, *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979), and he has failed to do so.

A. Local Utilities' Regulatory Burdens Cannot Justify The Discrimination

According to the Commissioner, the "unique status of public utilities," particularly the regulatory burdens that they but not their competitors encounter, justifies the discrimination.[9] The "sweet" non-regulation enjoyed by non-utilities, it is said, justifies the "bitter" sales and use taxes paid by those who purchase gas from them. (R. Br. 26) This argument is, not surprisingly, unsupported by any case authority.

No decision of this Court has ever suggested such a justification for discrimination. Indeed, this Court has repeatedly rejected states' efforts to justify discrimination on the theory that a home-field advantage is necessary to protect a disadvantaged local industry. *See, e.g., West Lynn Creamery, Inc. v. Healy*, 114 S. Ct. 2205, 2211, 2212-13 (1994); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263; *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935). The Commissioner's argument (R. Br. 23-29) instead reveals his true colors: He seeks to sustain the exemption as a measure to protect Ohio's utilities from the newly aggressive

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[9] The Commissioner quotes at length from *New York Rapid Transit Corp. v. City of New York*, 303 U.S. 573, 579 (1938) to prove "the unique status of public utilities." (R. Br. 26) *New York Rapid Transit*, however, was an equal protection case; it did not involve the Commerce Clause at all; and it nowhere suggests that the supposedly "unique" burdens of public utilities can somehow justify discriminatory taxation under the Commerce Clause.

competition from interstate markets, a plainly impermissible goal under the Commerce Clause.

B. The Exemption Is Not "Compensatory" For The Gross Receipts Tax

GM has shown that the sales and use tax on natural gas purchased from non-utility sellers is not, and cannot be justified as, compensatory for other types of taxes that are imposed upon public utilities. (GM Br. 17-18) Nonetheless, the Commissioner — aided by the *amicus curiae* brief of Columbia Gas of Ohio (an Ohio local public utility) — argues that "a comparison between the effective rate of taxation for the two groups shows that marketers are the favored class" when gross receipts taxes and public utility commission assessments are considered. (R. Br. 32) The Columbia Gas brief offers complex mathematical formulae ostensibly designed to prove this point. (*See* Br. *Amicus Curiae* of Columbia Gas of Ohio at 17-28)[10] While neither the Commissioner nor his *amicus* explicitly call this a "compensatory tax" defense, it is just that. And it is meritless by any name.

Fulton Corp. v. Faulkner, 116 S. Ct. 848 (1996), this Court's most recent "compensatory tax" case, establishes that the sales and use tax here cannot be seen as compensatory for the gross receipts taxes imposed upon local utilities (1) because the gross receipts taxes on utilities are imposed at a lower tax rate (4.75% of gross receipts — Ohio Rev. Code Ann. § 5727.38) than the sales and use tax (5 to 7% of purchase price — Ohio Rev. Code Ann. § 5739.025), and (2) because the taxes do not "fall on substantially equivalent events"; indeed, they are not even imposed on the same entity. Ohio Rev. Code Ann. §§ 5741.02(B), 5727.33, 5727.38. Neither the Commissioner nor his *amici* dispute these showings.

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[10] We note that the Commissioner — who bears the burden of establishing any such defense — offered no proofs on this issue in the courts and administrative proceedings below.

This Court should once again reject a state's invitation to "plunge . . . into the morass of weighing comparative tax burdens." *Oregon Waste Systems,* 114 S. Ct. at 1353 (quotation omitted). As reiterated just last term in *Fulton Corp. v. Faulkner,* the Court has repeatedly "decline[d] to shoulder any such analysis," because "'courts as institutions are poorly equipped to evaluate with precision the relative burdens of various methods of taxation.'" 116 S. Ct. at 859 (quoting *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue,* 460 U.S. 575, 589-90 & nn. 12-14 (1983)).[11] The exemption provision cannot be saved as a "compensatory" tax.[12]

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[11] "'The complexities of factual economic proof always present a certain potential for error, and courts have little familiarity with the process of evaluating the relative economic burden of taxes.'" *Fulton Corp. v. Faulkner,* 116 S. Ct. at 859 (quoting *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue,* 460 U.S. 575, 589-90 (1983)). Just such a "potential for error" is inherent in Columbia Gas's analysis, which proceeds from an erroneous assumption. Columbia Gas's mathematical proofs assume a sales or use tax rate of 5%. (Columbia Gas Br. at 20) But because of Ohio local taxes, the sales and use tax rate in certain municipal areas is as high as 7%. *See* Ohio Rev. Code Ann. § 5739.025; *cf. Associated Industries of Mo. v. Lohman,* 114 S. Ct. 1815. Because of these local taxes, GM was assessed tax of 5% for use of gas at its Lordstown assembly plant, 5 to 6% at its Portage County Packard Electric Division facility, 5.5% at its Mahoning County Packard Electric Division facility, and 6% at its central foundry plant in Defiance. *See* Statutory Transcripts at 128, 225-27 (filed by the Commissioner with the Ohio Board of Tax Appeals); Ohio Tax Rep. (CCH) ¶ 60-120, at 7259-84 (1995) (sales and use tax rates by jurisdiction).

[12] Nor can it be justified as a "health and safety" regulation, as the Commissioner halfheartedly suggests in a footnote. (R. Br. 33 n.4; *see also* R. Br. 22) It is intuitively absurd that the discriminatory imposition of a sales and use tax on purchases of natural gas serves a legitimate health and safety purpose that could not be served by available nondiscriminatory means. *Hughes v. Oklahoma,* 441 U.S. 322, 336 (1979). And it is well established that the bare assertion of a public

IV. CONGRESS HAS NOT RATIFIED THE DISCRIMINATION

The Commissioner's last line of defense is to argue that the discrimination has been ratified by Congress. He claims that in 15 U.S.C. § 717(c), Congress "has firmly placed its stamp of approval" upon the discriminatory exemption statute (R. Br. 34), and "has authorized the States to draw the very classification at issue in this case" (R. Br. 33), thus removing all restrictions imposed by the Commerce Clause. The Commissioner has never, until this brief, even hinted at this argument; none of his *amici* supports it;[13] and it is supported neither by this Court's precedents nor by the language of 15 U.S.C. § 717(c).

This Court's cases indicate that, as a necessary precondition to a conclusion "that Congress wished to remove federal constitutional constraints on . . . state laws," this Court must find that "Congress' 'intent and policy' to sustain state legislation from attack under the Commerce Clause'" has been "expressly stated,"[14] in "unmistakably clear" terms.[15] There must be an "unambiguous statement of congressional intent . . . 'to alter the limits of state power otherwise imposed by the Commerce Clause.'"[16] No such "unambiguous statement" exists here.

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health justification, without more, cannot save an otherwise-unconstitutional statute. *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951).

[13] The State of Kansas, *et al.*, makes a bare reference to this argument in their *amici curiae* brief. *See* Br. *Amici Curiae* of the State of Kansas *et al.* at 5 n.5.

[14] *Sporhase v. Nebraska*, 458 U.S. 941, 960 (1982) (citations and some internal quotations omitted).

[15] *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 91 (1984).

[16] *Maine v. Taylor*, 477 U.S. 131, 139 (1986) (quoting *United States v. Public Utilities Comm'n of California*, 345 U.S. 295, 304 (1953)).

First, section 717(c) nowhere provides the required "unambiguous statement of congressional intent" to cover state sales and use taxes at all. Neither section 717(c), nor any other provision of the Natural Gas Act, speaks in any fashion to state taxation. As the Commissioner properly points out (R. Br. 3, 35-36), section 717(c) was passed in response to the Court's decision in *Federal Power Comm'n v. East Ohio Gas Co.*, 338 U.S. 464 (1950), which held that the Federal Power Commission (the predecessor to the Federal Energy Regulatory Commission, or F.E.R.C.) had jurisdiction to regulate local public utilities. What section 717(c) implemented is what *East Ohio Gas* denied — exclusive regulatory authority for *state public utility commissions* over in-state natural gas transactions — leaving all other, interstate, aspects of the natural gas industry to F.E.R.C.'s national, preemptive jurisdiction. 15 U.S.C. § 717(c); *see also* H.R. Rep. No. 899, S. Rep. No. 817, 83d Cong., 2d Sess. (1953), *reprinted in* 1954 U.S.C.C.A.N. 2101. Section 717(c) was simply not concerned with state taxation: There was no design to return "regulatory" taxing power to state taxing authorities, because *East Ohio Gas* did not threaten such powers in the first instance. *See East Ohio Gas*, 338 U.S. at 476-78 (Jackson, J., dissenting).

However, the Commissioner suggests that in common usage, taxes are "one of the forms of regulation" (R. Br. 37), relying on isolated quotations from unrelated case law. While it may be true that taxation sometimes "regulates," it hardly follows that when Congress used the term "regulation" in section 717(c) it meant to include taxing authority.

Second, even if section 717(c) was meant to preserve state tax jurisdiction, there is no evidence whatsoever that it was designed to authorize discriminatory taxation, contrary to fundamental Commerce Clause principles. *See Maine v. Taylor*, 477 U.S. 131, 139 (1986).

Third, the major thrust of section 717 in particular, and the Natural Gas Act in general, is not to *give* power over interstate transactions to the states, but to *take it away*. Section 717 gives the F.E.R.C. preemptive federal power over "the transportation

of natural gas in interstate commerce, . . . the sale in interstate commerce of natural gas for resale . . ., and . . . natural-gas companies engaged in such transportation or sale." 15 U.S.C. § 717(b); *see also Northwest Central Pipeline Corp. v. State Corp. Comm'n of Kansas,* 489 U.S. 493, 506 (1989). Section 717(c) would not give Ohio jurisdiction over GM's gas purchases because states only have exclusive jurisdiction over persons transporting or selling gas "received . . . within or at the boundary of a State . . ., provided that the rates and service of such person and facilities be subject to regulation by a State commission." 15 U.S.C. § 717(c). *See also Northwest Central Pipeline Corp.,* 489 U.S. at 507. Of course, GM did not "receiv[e the gas] within or at the boundary of" Ohio, but in distant states. (J.A. 30, 41-45; *see generally* GM Br. 5) Nor is GM — or the out-of-state sellers — regulated "by a State commission." Thus, if section 717 speaks to taxes at all, the limited section 717(c) grant of state regulatory jurisdiction suggests federal preemption, not Congressional endorsement, of the discriminatory use taxes paid by GM.

V. THE DISCRIMINATORY TAX EXEMPTION ALSO VIOLATES THE EQUAL PROTECTION CLAUSE

In its opening brief (GM Br. 29-30), GM showed that the tax exemption also violates GM's equal protection rights, by taxing their gas purchases less favorably than those who purchase gas from local public utilities.

In response, the Commissioner first argues that, applying the "modest" rational basis test (R. Br. 39), the exemption statute passes muster under the Equal Protection Clause. While the rational basis test is indeed "modest," it still requires a state to articulate a rational basis that "may conceivably or 'may reasonably have been the purpose and policy' of the relevant governmental decisionmaker." *Nordlinger v. Hahn,* 505 U.S. 1, 15 (1992) (quoting *Allied Stores of Ohio, Inc. v. Bowers,* 358 U.S. 522, 528-29 (1959)). Imposing a tax on buyers from non-utilities such as GM, while exempting identically situated purchasers of identical gas delivered identically, is nothing more than the

differential treatment of identically situated taxpayer-purchasers which the Equal Protection Clause prohibits. However, it appears that the Commissioner argues that the tax rationally encourages purchasers to buy gas from local public utilities so that their regulatory obligations are somehow eased by the additional revenues that tax-exempt status might bring. But that argument cannot justify the tax because "promotion of domestic business within a State," at the expense of out-of-state competitors, "is not a legitimate state purpose." *Metropolitan Life Ins. Co. v. Ward,* 470 U.S. 869, 880 (1985). The discriminatory tax exemption thus flunks even the "modest" rational basis test.

It necessarily follows that the tax exemption also fails the heightened scrutiny applicable under the Equal Protection Clause to statutes which burden interstate commerce. (*See* GM Br. 30-31) The Commissioner says, however, that heightened scrutiny should not apply because the Commerce Clause does not confer sufficiently "fundamental" rights. (R. Br. 39-40) But as this Court explained in *Lehnhausen v. Lake Shore Auto Parts Co.,* 410 U.S. 356 (1973), "[w]here taxation is concerned *and no specific right,* apart from equal protection, is imperiled, the states have large leeway" in making tax classifications. *Id.* at 359 (emphasis added; footnote omitted). As examples of other "specific right[s]" which might be "imperiled," thus requiring a closer judicial look, the Court gave "the First Amendment" as well as the "taxes . . . that discriminated against interstate commerce . . . or required licenses to engage in interstate commerce." *Id.* at 359 n.3.

CONCLUSION

For the foregoing reasons, and for those reasons stated in GM's opening brief, the judgment of the Ohio Supreme Court should be reversed.

Respectfully submitted,

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IN THE
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GENERAL MOTORS CORPORATION,
Petitioner,
v.
ROGER W. TRACY, TAX COMMISSIONER OF OHIO,
Respondent.

On Writ of Certiorari to the Supreme Court of Ohio

BRIEF FOR CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL ASSOCIATION OF MANUFACTURERS, COASTAL GAS MARKETING COMPANY, ANR PIPELINE COMPANY, AND COLORADO INTERSTATE GAS COMPANY, AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*

Amicus Chamber of Commerce of the United States of America ("Chamber") is the largest federation of business, trade, and professional organizations in the United States. The Chamber represents the interests of more than 215,000 companies, as well as several thousand state and local chambers of commerce and trade and professional organizations. The Chamber regularly represents the interests of its members in critical matters before the courts, the United States Congress, the Executive Branch, and independent regulatory agencies of the federal government.

Amicus National Association of Manufacturers ("NAM") is the nation's oldest and largest broad-based industrial trade association. Its nearly 14,000 member companies and subsidiaries, including 10,000 small manufacturers, employ approximately eighty-five percent of all manufacturing workers and produce over eighty percent of the nation's manufactured goods. More than 158,000 additional businesses are affiliated with the NAM through its Associations Council and National Industrial Council.

Member companies of the Chamber and the NAM are representatives of that part of the nation's business sector which is most directly affected by state taxation of interstate operations. Members of the Chamber and/or NAM are involved in the natural gas industry, and many other members are companies, like the petitioner, which purchase natural gas to run their operations. The Chamber and the NAM also represent other companies well beyond the specific industries involved in this case which are equally disadvantaged by state taxation schemes that discriminate against interstate commerce.

Amici curiae Coastal Gas Marketing Company ("CGM"), ANR Pipeline Company ("ANR") and Colorado Interstate Gas Company ("CIG") are affiliated companies engaged in the gathering, processing, transportation, marketing, and purchase and sale of natural gas in interstate commerce. CGM is a gas marketing company that purchases and sells natural gas in interstate commerce. ANR and CIG are interstate natural gas pipeline companies that gather, process, and transport natural gas for hire in interstate commerce. CIG also purchases and sells natural gas at the wellhead, but because of federal policy, it is prohibited from transporting its own gas on its pipeline facilities.

Each of the *amici* has an immediate interest in the outcome of this case. *Amici* Chamber and NAM have members who, like the petitioner, purchase gas in Ohio, and

who therefore are subject to the Ohio taxation scheme. As an interstate marketer without distribution facilities of its own, CGM, which sells to end-users including petitioner, is placed at a competitive disadvantage to local distribution companies ("LDCs") when it seeks to sell directly to Ohio customers because, unlike LDCs, it cannot sell gas on a tax-exempt basis. Only LDCs are eligible for the tax exemption here because it is limited to sales by those who both transport and sell the gas that they deliver to Ohio customers. As interstate natural gas pipelines, ANR and CIG are precluded under federal law from making sales of gas that they have transported. Consequently, the Ohio tax exemption puts them, as well as other interstate pipelines, at an economic disadvantage because, unless they transport for an LDC, the ultimate sale will not be tax-exempt, thereby eliminating or potentially eliminating many transportation customers such as end-users or marketers.

While all *amici* thus have a direct interest in the outcome of this case, their interests extend far beyond concern about its immediate outcome. *Amici*'s overriding interest in this case is the danger that it poses for the natural gas industry and consumers of natural gas. This case involves a state tax classification that effectively places a greater burden on interstate businesses than on their intrastate competitors. If such state tax classifications are allowed to stand—and Ohio is by no means unique in its tax classification scheme—they will tilt the level playing field in the natural gas market away from interstate and in favor of local commerce. *Amici* therefore have a strong interest in this Court's reversal of the decision below and a holding that strongly reaffirms that interstate participants in the national gas market should be on an equal footing with their local competitors.[1]

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[1] Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court pursuant to Rule 37.3 of the Rules of this Court.

STATEMENT

To appreciate *amici*'s concerns with Ohio's tax exemption for sales of natural gas made by LDCs, it is necessary to understand the present legal and economic structure of the natural gas industry and the historical background from which it emerged.

Natural gas has long been recognized as a vital resource providing millions of consumers with an inexpensive and environmentally responsible source of energy that can be found in abundant supply within the United States. *Pennsylvania* v. *West Virginia*, 262 U.S. 553, *aff'd on reh'g*, 263 U.S. 350 (1923). Because of its importance to the nation and the national economy, Congress and federal regulatory bodies have been deeply engaged in shaping federal policy concerning natural gas for more than half a century.

A. Traditional Regulation Of The Natural Gas Industry: 1938-1978

Initial efforts to regulate the natural gas industry were designed to assure the production and delivery of adequate supplies of natural gas at "just and reasonable" prices to consumers. In 1938, Congress enacted the Natural Gas Act ("NGA") to regulate the sale for resale in interstate commerce of natural gas. 15 U.S.C. §§ 717-717w (1988). The "heart of the new regulatory system" was the "fixing of 'just and reasonable' " rates for natural gas companies (both producers and pipelines) that were engaged in the sale for resale in interstate commerce of natural gas. *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 611 (1944).

The structure was simple. Producers would sell their natural gas in the production area to interstate pipelines at Commission-determined just and reasonable rates. Pipelines would transport their purchased gas and their own production to the city gate for sale to LDCs at Commission-determined just and reasonable rates, which

were designed to recover the pipelines' cost of gas, cost of transmission, and a reasonable rate of return.

Traditional regulation of the natural gas industry by the Federal Power Commission ("FPC") and its successor, the Federal Energy Regulatory Commission ("FERC"), thus focused primarily upon the "bundled sales" services provided by interstate pipeline companies. These "bundled sales" services typically embraced all of the services, apart from production, from obtaining gas at the wellhead to delivering it to the customer, including purchasing the gas from producers, gathering the gas from the wellhead and moving it to a processing facility, processing or treating the gas stream, transporting the gas in interstate commerce, storing the gas to meet peak demands, and selling the gas to LDCs.

B. The Movement Toward Deregulation And Competition: The Natural Gas Policy Act Of 1978

As a result of the early federal regulation of interstate gas prices, the intra- and interstate markets for natural gas became increasingly separate. Joseph Fagan, *From Regulation To Deregulation: The Diminishing Role Of The Small Consumer Within The Natural Gas Industry*, 29 Tulsa L.J. 707, 714-15 (1994). Producers naturally gravitated towards the intrastate markets which were not subject to FPC control to secure the higher returns available in those markets. *Id.* at 715. The oil price dislocations of the early 1970's, which caused an increase in demand for natural gas, further balkanized the market because prices for intrastate gas rose while the price of interstate gas remained at artificially low regulated levels. This, in turn, caused a shortage on the interstate market.

In 1978, Congress responded to the natural gas shortages in the interstate market by enacting the Natural Gas Policy Act ("NGPA"). 15 U.S.C. § 3301 *et seq.* (1988). The NGPA (i) created new statutory rates intended to provide investors with adequate incentives to

develop new sources of supply; (ii) started the process of decontrolling wellhead prices of natural gas; and (iii) broke down the existing barriers between intrastate and interstate markets for natural gas. The NGPA's aim was to permit a competitive wellhead market where market forces play a "more significant role in determining the supply, the demand, and the price of natural gas." *Transcontinental Gas Pipe Line Corp.* v. *State Oil & Gas Bd.*, 474 U.S. 409, 422 (1986). The NGPA therefore radically changed a key aspect of the natural gas industry by beginning the elimination of Commission-determined prices for first sales of natural gas and replacing them with prices driven by the market.

C. The Contemporary "Regulatory" Framework: The Triumph Of Free Competition

In the years immediately following the NGPA, the supply of gas increased but demand decreased as a result of a national economic slowdown, conservation, and fuel shifting. This caused the price of new gas to plummet. The price of gas committed under the pipelines' long-term take-or-pay contracts with producers, however, did not change. As a result, LDCs—which were committed under provisions of their contracts with pipelines known as "minimum commodity bills" to pay for a minimum quantity of gas whether or not they actually took delivery—continued to pay prices for gas that were well above the market price at the wellhead. The FERC, concluding that minimum commodity bills "may inhibit natural gas price decreases that could otherwise result from competitive forces," responded by issuing Order No. 380. *Elimination of Variable Costs From Certain Natural Gas Pipeline Minimum Commodity Bill Provisions*, Order No. 380, FERC Statutes and Regulations ¶ 30,571, at 30,959 (1984). That Order eliminated minimum commodity bill provisions, and thereby freed LDCs to contract for the new low-priced supplies. According to the FERC, this Order was designed to further remove

market constraints, to allow greater competition, and to provide more accurate price signals to the wellhead, all leading to more reasonable prices for consumers. *Id.* at 30,969.

After freeing the LDCs from their old sales contracts with pipelines, the FERC became concerned that restrictions remained on transportation of the new low-priced gas. Thus, in 1985, it took the next significant step towards deregulation by issuing Order No. 436. *Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, Order No. 436, 50 Fed. Reg. 42408 (Oct. 18, 1985) ("Order 436"). Order 436 effectively required that pipelines become open access transporters—rather than merchants—of natural gas. Order 436 did not require pipelines to unbundle their sales services, but it did require them separately to identify the different services they offered, including bundled sales services, so that customers and shippers could contract for and bear the cost of those services actually needed. Accordingly, the transportation and sale of natural gas became distinct economic and commercial services. In that manner, pipelines and other gas merchants became direct competitors in the sale of gas to LDCs and to end-users, such as industrial consumers or gas-fired generators of electricity.

In 1989, Congress continued down the path of deregulation of and free competition in the natural gas industry by adopting the Natural Gas Wellhead Decontrol Act of 1989 ("Decontrol Act"). Pub. L. No. 101-60, 103 Stat. 157 (1989). That legislation amended the NGPA by repealing all remaining price controls in order to obtain more supplies at lower prices by creating competition among producers. H.R. Rep. No. 29, 101st Cong., 1st Sess. 6-7 (1989). The Act was designed to further the federal policy that no gas seller should have a competitive advantage over any other gas seller.

While the Decontrol Act reflected Congress's finding that the market for gas at the wellhead was sufficiently competitive to be deregulated, the FERC continued to be

concerned by what it perceived to be the anticompetitive impact of bundled transportation and sales by interstate pipelines. Thus, in 1992, it issued Order 636. *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, Order No. 636, 57 Fed. Reg. 13267 (Apr. 8, 1992) ("Order 636"). In that Order, the FERC required pipelines to unbundle gathering operations and costs from other operations and costs, such as transportation. The FERC made clear that the goal of the Order was to create a national gas market in which consumers and producers could meet anywhere on the pipeline grid to transact the most efficient deals possible so that the "public can realize the full benefits of competition at the wellhead." Order 636, 57 Fed. Reg. at 13269. In addition, the FERC emphasized that its goal was to "create a regulatory environment in which no gas seller has a competitive advantage over another gas seller." *Id.*

SUMMARY OF ARGUMENT

Ohio's tax exemption for purchases from certain in-state, but not from out-of-state, sellers violates settled principles of this Court's Commerce Clause jurisprudence. The tax preference accorded to purchases from certain in-state sellers will invariably induce purchasers of natural gas to deal with in-state rather than out-of-state sellers. The Ohio taxing scheme therefore "discriminates against interstate commerce . . . by providing a direct commercial advantage to local business." *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450, 458 (1959).

The conclusion that Ohio's tax preference for purchases from LDCs violates familiar Commerce Clause principles is reinforced by considerations of federal natural gas policy. Congress and the FERC are now fully committed to unfettered competition among all participants

in the natural gas market. Ohio's taxing scheme, which favors LDCs over interstate gas marketing companies, undermines this policy by tilting the level playing field of the free market towards in-state participants in that market. State tax classifications like Ohio's, which effectively burden interstate participants in the natural gas industry vis-à-vis their local competitors, therefore frustrate federal energy policy at the same time that they offend elementary Commerce Clause norms.

ARGUMENT

BY FAVORING PURCHASES OF GAS FROM LOCAL DISTRIBUTION COMPANIES OVER PURCHASES OF GAS FROM OUT-OF-STATE SELLERS, OHIO'S USE TAX VIOLATES THE COMMERCE CLAUSE'S BAR AGAINST DISCRIMINATORY TAXES AND UNDERMINES FEDERAL NATURAL GAS POLICY.

A. Ohio's Tax Exemption For Purchases From In-State But Not From Out-of-State Sellers Violates First Principles Of Commerce Clause Jurisprudence.

No principle is more firmly embedded in this Court's Commerce Clause jurisprudence than the doctrine that the states may not impose taxes discriminating against interstate commerce. See, *e.g.*, *Fulton Corp.* v. *Faulkner*, 116 S. Ct. 848 (1996); *Chemical Waste Management, Inc.* v. *Hunt*, 504 U.S. 334 (1992). Two equally well-established corollaries to this principle are that (1) a tax will be struck down as discriminatory under the Commerce Clause whether it discriminates in intent *or* effect, *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263, 270-71 (1984), and (2) even if the discrimination is inadvertent, it is constitutionally unacceptable because "equality for the purposes of competition and the flow of commerce is measured in dollars and cents, not legal abstractions," *Halliburton Oil Well Cementing Co.* v. *Reily*, 373 U.S. 64, 70 (1963).

Under these settled precepts, Ohio's tax exemption for sales of natural gas confined to companies that "own or operate the transportation and distribution equipment and deliver the natural gas to consumers in Ohio," Pet. App. 3a, cannot conceivably pass muster. For a potential purchaser of natural gas faced with the question whether to purchase from an Ohio LDC, and thus free of sales and use tax, or, alternatively, to purchase the gas from an out-of-state seller, and pay a use tax on the gas, the choice is obvious. Assuming the price for the gas is the same, the purchaser will invariably choose to purchase from the local seller. The Ohio taxing scheme therefore "forecloses tax-neutral decisions," *Boston Stock Exch.* v. *State Tax Comm'n*, 429 U.S. 318, 331 (1977), and "discriminates against interstate commerce . . . by providing a direct commercial advantage to local business," *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450, 458 (1959). In so doing, it "exerts an inexorable hydraulic pressure on . . . businesses to ply their trade within the State . . . rather than 'among the several States.'" *American Trucking Ass'ns* v. *Scheiner*, 483 U.S. 266, 286-87 (1987).

The only defense offered to General Motors' claim of discrimination—that the state would tax purchases of gas from in-state as well as out-of-state marketers that own no distribution facilities—is really no defense at all. This Court has consistently repudiated the suggestion that a tax that discriminates against interstate commerce may escape constitutional condemnation if it discriminates in favor of only some, but not all, local commerce. In *Associated Industries* v. *Lohman*, 114 S. Ct. 1815 (1994), for example, the Court invalidated a discriminatory use tax scheme that favored some, but not all, in-state sales. Likewise, in *Bacchus Imports*, 468 U.S. at 263, this Court struck down a Hawaii statute that exempted a locally produced brandy, but not other locally produced liquors, holding that "the effect of the exemption is clearly dis-

criminatory, in that it applies only to locally produced beverages, *even though it does not apply to all such products.*" *Id.* at 271 (emphasis added). And in *Dean Milk Co.* v. *City of Madison*, 340 U.S. 349 (1951), this Court struck down a milk inspection ordinance that favored some, but not all, in-state sellers. Indeed, as the Court declared in *Maryland* v. *Louisiana*, 451 U.S. 725, 759 (1981), "[w]e need not know how unequal the Tax is before concluding that it unconstitutionally discriminates."

B. Federal Natural Gas Policy Reinforces The Commerce Clause Proscription Against Taxes Providing A Competitive Advantage To Taxpayers Engaged In Local Rather Than Interstate Commerce.

While the foregoing application of familiar Commerce Clause principles to Ohio's use tax scheme leaves no doubt that it fails to survive constitutional scrutiny, there is an additional reason why the exemption for purchases from local distribution companies—but not from out-of-state sellers—must be struck down. As explained above (see *supra* pp. 6-8), federal natural gas policy is now fully committed to unfettered competition among all participants in the natural gas market. The agency charged with overseeing our nation's natural gas policy has endorsed the creation of a national gas market "in which no gas seller has a competitive advantage over another gas seller," Order 636, 57 Fed. Reg. at 13269, and in which the "public can realize the full benefits of . . . competition," *id.*

The strong federal policy towards unbridled competition in the natural gas market, in which artificial advantages are not provided to one seller over another, reinforces the conclusion that the Commerce Clause bars Ohio's tax preference for local over out-of-state sellers. Examination of the impact of the Ohio decision on consumers, interstate pipelines and gas marketers, like *amici*,

demonstrates why it simultaneously offends both the Commerce Clause and federal energy policy.[2]

It is plain that Ohio's tax exemption for those who purchase gas from LDCs, but not for those who purchase gas from out-of-state sellers, discriminates against interstate commerce by skewing consumers' choices towards local sellers. This discrimination has a direct—and invidious—competitive impact upon consumers as well as interstate gas marketers and interstate pipelines such as *amici* CGM, ANR and CIG. Consumers are injured, of course, by the absence of an efficient, fully competitive market. Interstate gas marketers, like CGM, are placed at an economic disadvantage when they seek to compete with Ohio LDCs in selling gas to Ohio purchasers because the LDCs can sell the gas to those purchasers on a tax-free basis whereas the gas sold by the interstate marketer will incur an Ohio use tax. And interstate pipelines, like ANR and CIG, are placed at an economic disadvantage because, unless they transport for an LDC, the ultimate sale will not be tax-exempt, thereby eliminating or potentially eliminating many transportation customers such as end-users or marketers.

The discrimination that Ohio's taxing regime visits upon consumers, interstate pipelines and marketers not only violates the bedrock principles of Commerce Clause jurisprudence described above, it also frustrates federal natural gas policy for essentially the same reasons. Just as the "[t]he very purpose of the Commerce Clause was to create an area of free trade among the several States," *McLeod* v. *J.E. Dilworth Co.*, 322 U.S. 327, 330 (1944),

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[2] Congress intended through the NGA and the Decontrol Act comprehensively to regulate the sale of natural gas, leaving no room for the states to supplement federal law. It did so expressly to allow an unfettered marketplace for the sale of natural gas. *See, e.g., Schneidewind* v. *ANR Pipeline Co.*, 485 U.S. 293, 300-03 (1988); *Transcontinental Pipe Line Corp.* v. *State Oil & Gas Bd.*, 474 U.S. 409, 422-25 (1986).

so the federal natural gas policy is committed to the creation of a free competitive market in natural gas. And just as taxes that effectively burden interstate participants in that market more than local participants violate the Commerce Clause bar against taxes "favor[ing] local commercial interests over out-of-state businesses," *Boston Stock Exch.*, 429 U.S. at 334-35, so these taxes, which are a backdoor form of state regulation, undermine federal policy to "create a regulatory environment in which no gas seller has a competitive advantage over another gas seller," Order 636, 57 Fed. Reg. at 13269.

In short, federal natural gas policy reinforces Commerce Clause policy in condemning Ohio's taxing scheme. Because these two policies share the underlying purpose of maintaining a level playing field in which market forces can freely operate to the ultimate benefit of consumers, they are equally intolerant of a taxing regime like Ohio's which upsets that competitive equilibrium in favor of local economic interests and provides an advantage to certain competitors over others not by dint of their natural economic advantages in a free market but simply by the fact that they are in-state rather than interstate actors.

* * * * *

Reversal of the Ohio Supreme Court's decision is necessary to vindicate the underlying purposes of the Commerce Clause which are embodied in federal natural gas policy. Moreover, reversal is essential so that the Court can reaffirm the vital principle that all state taxation efforts that tilt the playing field in favor of local market participants are impermissible.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed.

Respectfully submitted,

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No. 95-1232

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1995

GENERAL MOTORS CORPORATION,
Petitioner,

v.

ROGER W. TRACY, TAX COMMISSIONER OF OHIO,
Respondent.

On Writ of Certiorari to the Supreme Court of Ohio

BRIEF OF THE PROCESS GAS CONSUMERS GROUP AND THE NATURAL GAS SUPPLY ASSOCIATION AS AMICI CURIAE IN SUPPORT OF PETITIONER

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BRIEF OF THE PROCESS GAS CONSUMERS GROUP AND THE NATURAL GAS SUPPLY ASSOCIATION AS AMICI CURIAE IN SUPPORT OF PETITIONER

INTEREST OF AMICI CURIAE

The Process Gas Consumers Group ("PGC") is a non-profit national association consisting of industrial corporations that require natural gas in many of their key operations. Organized in the District of Columbia in 1978, PGC works

to promote coordinated, rational and consistent federal and state policies relating to natural gas and its transportation.

PGC has 17 member companies that represent a broad cross-section of U.S. industry, both geographically and in terms of products produced. Their combined operations -- located in 34 states and employing approximately 1.5 million people -- consume approximately 450 billion cubic feet of natural gas annually.

The Natural Gas Supply Association ("NGSA") represents integrated and independent companies that produce and market domestic natural gas. Established in 1965, NGSA encourages expanded use of natural gas and a regulatory climate that fosters competitive markets. NGSA's members sell natural gas to marketers, local distribution companies, and consumers. Some of NGSA's members also operate refining and manufacturing facilities that consume substantial quantities of natural gas.

A number of PGC's members have manufacturing facilities in Ohio and purchase natural gas from out-of-state sources. Many NGSA members sell natural gas that is used by Ohio consumers. Thus, each organization has a decided interest in the outcome of the instant case.

Beyond the immediate impact of the Ohio tax at issue, PGC and NGSA are very concerned about any state tax schemes that discriminate against natural gas sales by out-of-state marketers and producers. As discussed below, today's natural gas markets are national in scope but could be quickly balkanized if states are permitted to use tax schemes to tilt markets in favor of in-state sellers. The disruptions of interstate natural gas markets that would result from such

discrimination would be harmful to both gas users and gas producers throughout the country.

PGC and NGSA submit this brief *amici curiae* in support of petitioner.[1/]

The Context of This Proceeding: The Natural Gas Industry Today

Today's natural gas industry is radically different from the natural gas industry that existed in the past. Twenty years ago, natural gas sales to consumers were made almost entirely by local distribution companies ("LDCs"), which in turn purchased almost all of their gas from interstate pipelines. Today, largely as a result of federal policies implemented beginning in the 1980's, many large users purchase natural gas directly from independent marketers and producers in interstate transactions. Indeed, even some small commercial entities, including schools and hospitals, now purchase their gas from entities other than the traditional LDCs. Thus, in today's environment, LDCs compete directly with producers and marketers for natural gas sales to local consumers. Gas producers and marketers frequently operate in states other than the state of ultimate use, and many sales thus take place outside the state of ultimate use, with the buyer responsible for arranging transportation to the point of consumption.

Competition for sales to natural gas users has developed as a result of the natural gas transportation revolution of the last ten years. Beginning in the mid-1980's,

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[1/] Both petitioner and respondent have consented to the filing of this brief *amici curiae* in letters lodged with the Clerk of this Court.

the Federal Energy Regulatory Commission ("FERC") encouraged interstate pipelines to transport, on an "open access" basis, natural gas sold by sellers other than the pipelines themselves.[2/] Pursuant to the FERC's "open access" transportation policies, consumers, LDCs and any other interested entity can arrange with an interstate pipeline for the transportation of natural gas purchased from any producer or independent marketer.

In 1992, the FERC further revised its open access transportation regulations to *require* contract carriage of gas by interstate pipelines and to complete the unbundling of the interstate pipelines' merchant and transportation functions.[3/] Now, as a practical matter, interstate pipelines are no longer in the merchant business; they perform only contract carriage services on behalf of any willing shipper of gas, including LDCs, commercial and industrial gas users, and natural gas marketers.

[2/] Prior to 1985, the FERC authorized limited programs for interstate pipelines to transport gas purchased by users and LDCs directly from gas producers and independent marketers. Those programs were then expanded in late 1985 to provide "open access" transportation on behalf of any willing shipper without discrimination against any seller or buyer. See Order No. 436, Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, 50 Fed. Reg. 42408 (Oct. 18, 1985), FERC Stats. 4 Regs. [Regulations Preambles 1982-1985] ¶ 30, 665 (1985).

[3/] Order No. 636, Pipeline Service Obligations and Revision to Regulations Governing Self-Implementing Transportation and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, 57 Fed. Reg. 13267 (1992), *appeal pending sub nom., United Distribution Cos.* v. *FERC*, No. 94-1485 (D.C. Cir.).

Today, most large LDCs offer to transport customer-owned natural gas from the outlet of interstate pipelines to the customer's facilities. However, unlike the interstate pipelines, LDCs also continue to compete with producers and marketers for gas sales to consumers connected to their distribution systems.

In order to be able to sell gas to local consumers, an LDC will itself typically purchase gas from producers and marketers located outside the state in which the LDC's distribution system is located. In addition, some LDCs, including Ohio LDCs, are able to purchase gas from in-state producers of natural gas or are able to produce gas from their own in-state wells that are connected to their local distribution systems.

Natural gas consumers are very sensitive to prices and view total delivered cost as a key factor in their choice of seller. Taxes can be a significant element in the decision if competing sellers' prices are otherwise similar. Any tax scheme that favors in-state sellers or even a subclass of in-state sellers, such as LDCs, over out-of-state sellers will inevitably tilt the competitive market against interstate commerce in natural gas.

The success of the competitive natural gas market that now exists depends upon the ability of buyers and sellers to purchase and sell natural gas without discrimination against interstate commerce in natural gas. Any state-approved tax scheme that discriminates against interstate sellers will ultimately harm both consumers and producers by balkanizing markets for natural gas. It is for that reason that the Process Gas Consumers Group and the Natural Gas Supply

Association -- organizations whose members are located at both ends of the interstate natural gas system -- submit this brief *amici curiae*.

SUMMARY OF ARGUMENT

The Ohio sales and use taxing scheme patently discriminates against interstate commerce by providing an exemption that benefits only local public utilities, to the detriment of out-of-state independent marketers and producers of natural gas. For that reason, it must be struck down based on a long line of cases.

Two cases in particular support the conclusion that the Ohio sales and use taxing scheme is unconstitutional -- *Boston Stock Exchange* v. *State Tax Commission*, 429 U.S. 318 (1977) and *Westinghouse Electric Corp.* v. *Tully*, 466 U.S. 388 (1984). In both cases, this Court struck down taxing schemes that had the effect of encouraging transactions to be consummated in the home State to the detriment of interstate commerce. The exemption to the Ohio sales and use tax has the identical effect.

The Ohio Supreme Court's test for discrimination under the Commerce Clause was flawed because it focused solely on the application of the tax exemption to independent marketers. Instead, the Ohio Supreme Court should have focused on who was eligible for the tax exemption.

Finally, respondent improperly relies on *Amerada Hess Corp.* v. *Director, Div. of Taxation*, 490 U.S. 66 (1989), to support its assertion that the difference between Ohio public utilities and independent marketers and producers justifies their disparate treatment. Unlike the situation here,

the tax scheme at issue in *Amerada Hess* did not have the effect of encouraging or favoring any particular type of local activity.

ARGUMENT

The Exemption For "Natural Gas Companies" From Ohio's Sales and Use Tax Impermissibly Discriminates Against Interstate Commerce.

Article I, §8, cl.3 of the U.S. Constitution gives the Congress the power, "To regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes." Under this Court's Commerce Clause analysis, a state taxing scheme will be struck down if it discriminates against interstate commerce.

Amici believe it is clear that the structure of the Ohio sales and use tax, with its exemption for "natural gas companies" as that term has been defined, discriminates against out-of-state purchases of natural gas and thus violates the Commerce Clause.

A. The Ohio Taxing Scheme Unmistakably Discriminates Against Interstate Commerce

Large consumers of natural gas in Ohio have two choices of suppliers from which to purchase natural gas -- independent natural gas producers or marketers and LDCs. Regardless of from which entity a consumer ultimately chooses to purchase its natural gas, the gas will generally be

delivered to the consumer by local distribution pipelines that are owned by the LDCs.[4/]

From the consumer's perspective, because each of the two classes of suppliers offers the identical product (*i.e.*, natural gas) and delivers the natural gas in essentially the identical manner (*i.e.*, through local distribution pipelines owned by the LDCs), the purchase price of the natural gas is a significant factor in the consumer's purchasing decision.

Ohio exempts from its sales and use tax only purchases of natural gas from "natural gas companies," defined as suppliers which themselves also deliver the natural gas to their customers in Ohio. *See* Ohio Rev. Code Ann. section 5739.02(B)(7); *Chrysler Corp.* v. *Tracy*, 652 N.E. 2d 185 (Ohio 1995). In other words, to qualify for the tax exemption, the gas must be sold and delivered to the consumer by the same entity. Because the LDCs own the local distribution pipelines and are therefore the only sellers of natural gas that can also deliver gas to consumers in Ohio, sales of natural gas by the LDCs are the only sales eligible for the tax exemption.

Amici see no need to restate Petitioner's thorough discussion of the relevant decisions of this Court that prohibit a state from imposing a tax which discriminates against interstate commerce by providing a direct commercial advantage to local business. *Amici* do, however, wish to

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[4/] In a few instances, industrial users have been able to install gas lines that run directly from an interstate pipeline to their plants, thereby avoiding the local distribution pipelines. However, the vast majority of natural gas purchased by industrial users in Ohio is delivered through pipelines owned by the LDCs.

emphasize the relevance to the instant case of this Court's decisions in *Boston Stock Exchange* v. *State Tax Commission*, 429 U.S. 318 (1977) and *Westinghouse Electric Corp.* v. *Tully*, 466 U.S. 388 (1984).

Boston Stock Exchange struck down a New York tax on stock transfers that discriminated against stock sales made outside of New York in favor of sales made in New York. Sellers of stock, wherever located, had the option of selling their shares on either the New York Stock Exchange or on one of several "regional" stock exchanges. The effect of the New York stock transfer tax scheme was to encourage stock sales on the New York Stock Exchange. The New York stock transfer tax thus had the effect of influencing a seller's decision as to where to consummate the sale.

In a parallel to the tax scheme involved in *Boston Stock Exchange*, the exemption from the Ohio sales and use tax affects the Ohio gas consumer's decision as to where to consummate its purchases. The Ohio gas consumer has the option of entering into a transaction with either an LDC or an independent marketer or producer. If the consumer selects an out-of-state marketer, it will *always* be subject to the use tax. If the consumer selects an LDC, its purchase will be tax-exempt.

Under both the New York and Ohio schemes, a tax benefit could be enjoyed if the activity in question (selling stock or purchasing gas) occurred locally, and a tax detriment would result if the activity occurred outside the state. The result in both cases unquestionably is to encourage the affected parties to avail themselves of the favored local

option. That constitutes unconstitutional discrimination against interstate commerce.[5/]

In *Westinghouse Electric*, this Court struck down New York's franchise tax provision that governed the tax treatment of income earned from export sales made through a Domestic International Sales Corporation (DISC). This Court concluded that the taxing scheme favored DISC sales made through New York, to the detriment of DISC sales made from other locations. As this Court stated:

> Whether the discriminatory tax diverts new business into the State or merely prevents current business from being diverted elsewhere, it is still a discriminatory tax that "forecloses tax neutral decisions and...creates...an advantage" for firms operating in New York by placing "a discriminatory burden on commerce to its sister states." *Boston Stock Exchange*, 429 U.S., at 331.

466 U.S. at 406.

Drawing further upon its reasoning in the earlier case, this Court added:

[5/] Even if the gas sold by an LDC were viewed as "interstate gas" to the extent it originated outside the State, as would be the case with gas sold by an out-of-state marketer, *Boston Stock Exchange* requires that the Ohio taxing scheme be struck down because a State may not tax "in a manner that discriminates between two types of interstate transactions in order to favor local commercial interests over out-of-state business...." 429 U.S. at 335.

> The State has violated the prohibition in *Boston Stock Exchange* against using discriminatory state taxes to burden commerce in other States in an attempt to induce "business operations to be performed in the home State that could more efficiently be performed elsewhere...." (citations omitted).

Id.

The analysis of the New York taxing scheme set forth in *Westinghouse Electric* is directly applicable to the Ohio taxing scheme at issue in the instant case. The effect of the tax exemption granted for sales made by LDCs in Ohio is to induce consumers to make their gas purchases from such local suppliers, to the detriment of out-of-state producers and marketers. A taxing scheme with such a discriminatory design is simply not permitted under the Commerce Clause.[6/]

B. The Court Below Upheld the Ohio Taxing Scheme by Applying an Erroneous Test

The Ohio Supreme Court saw no impermissible discrimination in the Ohio taxing scheme on the ground that

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[6/] Respondent suggests that the sales/use tax that is imposed on gas purchases from independent marketers is complementary to the Ohio gross receipts tax imposed on LDCs. (Resp. Br. in Opp. p. 11 n.3.) Under this Court's decision in *Fulton Corp.* v. *Faulkner*, 116 S.Ct. 848, 856 (1996), however, the fact that the 5-7% sales/use tax rate exceeds the 4.75% gross receipts tax rate means that the sales/use tax is not a constitutionally permissible "compensatory" tax. *See also Associated Industries of Missouri* v. *Lohman*, 114 S. Ct. 1815, 1821 (1994). In addition, because the two taxes are imposed on different classes of taxpayers, it would appear under *Fulton Corp.*, 116 S. Ct. at 858, that the taxes could not qualify as complementary taxes for that reason as well.

gas purchased from in-state independent marketers is subject to the sales tax in the same manner that gas purchased from out-of-state independent marketers is subject to the use tax -- neither transaction is eligible for tax exemption because neither type of marketer will itself actually deliver the gas to its customers. The Ohio statute, the court held, thus cannot be said to favor in-state vendors over out-of-state vendors.

The court below erred by focusing solely on the application of the tax exemption to independent marketers. Instead, the Ohio Supreme Court should have focused on who was eligible for the tax exemption. Because the tax exemption is *only* available for in-state purchases of natural gas from LDCs, and because out-of-state purchases (whether from independent marketers or producers) are *never* eligible for the exemption, the Ohio sales and use taxing scheme impermissibly discriminates against interstate commerce in favor of local activity.

The fact that independent marketers within Ohio, like their out-of-state counterparts, are not eligible for the tax exemption is of no significance. This Court has consistently held that a statute will not pass constitutional muster merely because the statute, in addition to disfavoring interstate commerce, also works to disfavor some intrastate commerce. *See, e.g., Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263, 271 (1984); *Dean Milk Co.* v. *City of Madison*, 340 U.S. 349, 354 n.4 (1951).

Here, because the exemption from the Ohio sales tax applies only to LDCs, and the exemption from the use tax *never* applies to out-of-state independent marketers, the Ohio

sales and use taxing scheme discriminates against interstate commerce.

C. Ohio's Reliance on *Amerada Hess* is Misplaced

Respondent suggests that the exemption from the Ohio sales and use tax for natural gas sold by LDCs does not run afoul of the Commerce Clause because there is a "legitimate distinction" between LDCs and independent marketers. Respondent cites *Amerada Hess Corp.* v. *Director, Div. of Taxation*, 490 U.S. 66 (1989) as authority for this proposition. (Resp. Br. in Opp. p. 12-13.) *Amerada Hess* does not provide any such support.

Amerada Hess upheld a provision requiring the "add back" of all federal taxes on income and profits, including the windfall profits tax, in the computation of the New Jersey corporate tax base. The windfall profits tax was imposed only on oil producers. Independent retailers, who directly competed with oil producers for sales of petroleum products to New Jersey consumers, were not subject to the windfall profits tax because they were not producers of oil.

The oil producers that sold their products at retail in New Jersey argued that the "add back" of the windfall profits tax to the New Jersey corporate tax base discriminated against interstate commerce because it put them at a disadvantage vis-a-vis the independent non-producing retailers who did not incur the tax.

This Court held that there was no discrimination against interstate commerce in *Amerada Hess* because the windfall profits tax was not imposed based on location, but

rather on the activity of oil production wherever conducted. The "add back" of that tax thus did not have the effect of encouraging oil production (or favoring any other activity) within New Jersey.

Here, however, the "natural gas company" exemption from the Ohio sales and use tax works solely to the advantage of the local distribution companies. No out-of-state sellers of natural gas are eligible for the exemption because no out-of-state sellers have the capability of making local delivery. Consequently, the Ohio taxing scheme clearly discriminates in favor of specific local activity. *Amerada Hess* provides no support for respondent.

* * *

State taxing schemes that have the effect of favoring local interests over interstate commerce cannot pass constitutional scrutiny. If the taxing scheme here at issue is upheld, Ohio and other states will surely be encouraged to enact new and creative schemes of a similar nature, affecting not only natural gas but other industries as well. The free, open and robust interstate competition contemplated by the Framers would then be severely impaired. Opening the door to such a result here would represent a sea change in this Court's treatment of such taxing schemes.

CONCLUSION

For all of the foregoing reasons, the decision of the court below should be reversed.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

GENERAL MOTORS CORPORATION,
Petitioner,

v.

ROGER W. TRACY,
TAX COMMISSIONER OF OHIO,
Respondent.

On Writ of Certiorari to the
Supreme Court of Ohio

BRIEF OF THE STATES OF KANSAS, CALIFORNIA, CONNECTICUT, ILLINOIS, NEVADA, NORTH DAKOTA, VIRGINIA AND WEST VIRGINIA AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICI CURIAE*

Amicus State of Kansas and other *amici* States write to urge the Court not to abandon its traditional deference to the States' exercise of police powers in separately regulating and taxing the local distribution of vital commodities such as natural gas. Currently all 50 States regulate the business of local natural gas distribution, which is performed by regulated utilities usually called "local distribution companies" ("LDCs").[1] Such regulation universally imposes

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[1] State statutes that specifically provide for regulation of sales of natural gas include: Ala. Code §§ 37-4-80, 37-4-83 (1995); Del. Code Ann. tit. 26, §§ 102, 201 (1990); D.C. Code Ann. § 43-1001(3) (1996); Fla. Stat. ch. 366.02, 366.03, 366.14 (1995); Ga. Code Ann. § 46-1-1(15), 46-2-20(a), 46-2-21, 46-2-23(a) (1996); Iowa Code § 476.1(1) (1995); Ky. Rev. Stat. Ann. §§ 278.010, 278.040, 278.495 (Michie 1989); La. Rev. Stat. Ann. §§ 45-301, 45-302 (West 1982); Md. Ann. Code §§ 78-1, 78-2 (1957); Mich. Stat. Ann. § 460.6 (Callaghan 1995); Miss. Code Ann. §§ 77-3-3, 77-3-5 (1991); Minn. Stat. Ann. § 216B.045 (1995); Neb. Rev. Stat. § 19-4603 (1995); Nev. Rev. Stat. § 704.075 (Michie 1995); N.H. Rev. Stat. Ann. §§ 362:2,374:3 (1995); N.J. Rev. Stat. § 48:9-17 (1994); N.C. Gen Stat. §§ 62-3 (23), 62-30 (1995); Ohio Rev. Code Ann. § 4933.01 (Baldwin 1991); R.I. Gen. Laws §§ 39-1-2(7), 39-1-3 (1995); S.C. Code Ann. §§ 58-5-10, 58-5-210 (Law co-op. 1993); Tex. Rev. Civ. Stat. Ann. art. 1446c, 1446e (West 1980) ; Utah Code Ann. §§ 54-2-1(8), 54-4-1 (1995); Wash. Rev. Code Ann. §§ 80.04.010,80.04.015 (1995); W. Va. Code § 24-2-1 (1996); Wis. Stat. §§ 196.01, 196.02- 196.03 (1994); Wyo. Stat. §§ 37-1-101, 37-2-112 (1996).

State statutes providing for general power to regulate public utilities include:Alaska Stat. §§ 42.05.141, 42.05.291 (1995); Ariz. Rev. Stat. Ann. §§ 40-201(4), 40-203 (1995); Ark. Code Ann. §§ 23-15-203, 23-15-204 (Michie 1995); Cal. Public Utilities Code § 701 (Deering 1990); Colo. Rev. Stat. §§ 40-1-103, 40-2-108 (1995); Conn. Gen. Stat. §§ 16-270, 16-271 (1994); Haw. Rev. Stat. §§ 269-1, 269-6 (1996); Idaho Code §§ 61-129, 61-301, 61-303 (1996); Ill. Ann. Stat. ch. 220, para. 5/3-105, 5/4-101 (1993); Ind. Code Ann. § 8-1-2-1 (Burns 1996); Kan. Stat. Ann. §§ 66-104, 66-1,185, 66-1,204 (1993); Mass. Ann. Laws ch. 164 §§ 1,

public service requirements upon LDCs that include comprehensive rate regulation.

Although rate regulation constitutes perhaps the best known feature of public utility regulation, it forms only one aspect of State involvement in supervising the local distribution business. That supervision traditionally involved the grant of a monopolistic franchise along with attendant powers--such as eminent domain authority--to carry out the purposes of the franchise. On the other hand, the States would impose constraints in the form of rate regulation and other defined public service obligations.

Because the character of local distribution as a regulated monopoly virtually assured returns on investment and insulated utility investors from competitive enterprise, the States and their subdivisions regularly imposed special tax burdens on utilities to meet various needs of the public fisc. This Court repeatedly upheld such exactions against equal protection challenges, recognizing the legitimate State objectives in separately regulating and taxing the activities of utilities and common carriers.

Of the 50 States, 31 States have enacted separate taxation structures that reflect the regulated and monopolistic

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93, 94 (Law. Co-op. 1988); Me. Rev. Stat. Ann. tit. 35-A, §§ 102-103 (West 1982); Mo. Rev. Stat. § 393.010 (1995); Mont. Code Ann. §§69-3-101,69-3-102 (1995); N.M. Stat. Ann. § 68-3-2(F)(2) (1974); N.Y. Public Utilities Law § 47-65(Consol. 1995); N.D. Cent. Code §§ 49-02-01, 49-02-02 (1995); Okla. Stat Ann. tit. 17, §§ 151-152 (West 1987); Or. Rev. Stat. §§ 50-757.005, 50-756.040 (1995); 66 Pa. Cons. Stat. Ann. §§ 102,501 (1993); S.D. Codified laws Ann. §§ 49-34A-2, 49-34A-4 (1993); Tenn. Code Ann. §§ 65-4-101, 65-4-117 (1993); Vt. Stat. Ann. tit. 30, §§ 201, 203 (1987); Va. Code Ann. §§ 56-1, 56-2, 56-232, 56-232.2 (1995).

character of LDC business,[2] including at least 8 States like Ohio that subject LDCs to a significantly higher burden of personal property taxation.[3] Five States and the District of

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[2] The statute cites for States with generally separate tax structures includes the following: Ala. Code § 40-21-80 (1995), Alaska Stat. § 43.55.016 (1995), Colo. Rev. Stat. Ann. §§ 39-4-101, -102 (West 1990), Conn. Gen. Stat. Ann. § 12-264 (West 1990), Del. Code Ann. tit. 30, §§ 5501, 5502 (1985), Fla. Stat. Ann. § 203.01 (West 1993), Ga. Code Ann. § 48-5-510 et seq. (Harrison 1984), Haw. Rev. Stat. § 239-5 (1994), Idaho Code § 63-701 (1994), Ill. Rev. Stat. ch. 220, para. 5/2-202 (1993), Ind. Code Ann. § 6-1.1-8-1 et seq. (West 1978), Iowa Code Ann. § 438.1 et seq. (West 1992), La. Rev. Stat. Ann. § 47:1031 (West 1982), Me. Rev. Stat. Ann. tit. 36, § 1811 (West 1964), Md. Code Ann., Tax-Gen. §§ 8-401, -402 (1973), Mass. Gen. Laws Ann. ch. 63, § 52A (Law. Co-op. 1991), Minn. Stat. Ann. § 216B.36 (West 1995), Mont. Code Ann. § 15-6-137 (1995), N.J. Stat. Ann. § 54:30A-1 et seq. (West 1983), N.M. Stat. Ann. § 7-33-1 (Michie 1978), N.Y. Tax Law § 186-a (McKinney 1987), N.C. Gen. Stat. § 105-116 (1994), Okla. Stat. Ann. tit. 68, §§ 2847, 2852 (West 1993), Pa. Stat. Ann. tit. 72, § 8101 (1990), R.I. Gen. Laws § 44-13-1 (1995), Tenn. Code Ann. § 67-4-405 (1995), Tex. Tax Code Ann. § 182.021 (West 1992), Va. Code Ann. §§ 58.1-2600, 2620 (Michie 1991), Wash. Rev. Code Ann. § 82.16.020 (West 1994), W. Va. Code § 11-13-2d (1995).

[3] Ala. Code § 40-1-1 et seq. (1975) (utilities pay not only a gross receipts tax, but utility property is assessed at 30%, while other non-utility property is assessed at 20% or less);Ariz. Rev. Stat. Ann. § 42-101 et seq. (1996) (utility property is assessed at a ratio of 30%, while other commercial or industrial non-utility property is assessed at 25%); Kan. Const. art. 11, § 1 (1995) (utility property is assessed at ratio of 33%, while commercial property is assessed at 25%); La. Rev. Stat. Ann. § 47:1854 (West 1963) (public service property is assessed at ratio of 25%; non-utility at 15%); Miss. Code Ann. § 27-31-1 et seq. (1996) (public utility property assessed at ratio of 30%, non-utility and railroad at 15%); Mont. Code Ann. § 15-6-141 (1995) (centrally-assessed utility property at 12%; non-utility and other non-centrally assessed utility property ranges from 3 - 9%); Pa. Stat. Ann. tit. 72, § 8101-A et seq. (1990) (utility property is not assessed locally; instead a statewide public utility realty tax, PURTA, is levied on utility real property, with rate of 30 mills to the dollar; additional realty tax at 12 mills imposed at end of

Columbia at present draw distinctions between purchases from LDCs and purchases from unregulated, private businesses that might be called into question by the challenge made in this case.[4] The States' foremost concern in this case is that a decision of this Court invalidating these traditional distinctions would impose significant forfeitures upon State treasuries. Moreover, it would be particularly disruptive for this Court to render a decision that calls into question any treatment of LDCs distinct from private businesses.

Contrary to suggestions of General Motors and the *amici* supporting its position, the deregulation of interstate pipeline business at the federal level does not imply any need to activate the dormant commerce clause to effect similar deregulation at the level of local distribution. Not only has Congress granted and never withdrawn its express statutory

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preceding calendar year); Tenn. Code Ann. § 67-1-201 et seq. (1995) (real property of utility assessed at 55%, non-utility at 40%; personalty of utility at 55%, non-utility at 30%).

[4] The statute cites for States which similarly distinguish between purchases of natural gas from marketers and purchases from public utilities include the following: Ala. Code §§ 40-23-4(8), 40-23-62(10)(1995); Conn. Gen. Stat. § 12-412 (1994); D.C. Code Ann. §§ 47-2005(24), 47-2206 (1996); Ind. Code Ann. §§ 6-2.5-5-16 (Burns 1996); Kan. Stat Ann. § 79-3606(f)(1993); Md. Code Ann., Tax-Gen § 11-207(2). In addition, numerous States exempt sales to residential consumers, which currently are virtually the exclusive province of LDCs.

endorsement of State regulation in this regard,[5] but other considerations show the legitimate State interests that continue to undergird Congress' determination.

The States are committed to deriving each and every benefit that may be obtained from loosening the traditional bonds of regulation. But deregulation at the level of local distribution is not only fraught with challenges different from those faced in deregulating interstate pipeline business, but has been profoundly affected by the very fact of deregulation at the federal level. It is widely acknowledged that the average residential consumer has not shared in the lower-cost boons of deregulation to date. Less clear is what structures will both contain costs and assure service to each and every residential consumer on the coldest day of the year.

Moreover, the pursuit of regulatory objectives has led to special structuring of the business of local distribution, which clearly demarcates it as a separate business from the ordinary private business engaged in by the marketers from whom General Motors purchased in this case. Specifically, rate regulation and the requirement to serve the general public--including the obligation to reserve adequate commodity and pipeline capacity to serve consumers on demand on the coldest day of the year--mean that a utility consumer pays a price reflecting the total costs of utility service. Unlike General Motors' commodity purchases from marketers, the utility service price bundles together (i) acquisition cost of gas to the utility; (ii) cost of interstate pipeline capacity, including ratable share of enhanced cost of the assuring service at peak demand; and (iii) other public service costs, such as payment to help defray losses from

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[5] Under the Natural Gas Act, Congress expressly granted authority to States to regulate the local distribution aspect of the natural gas industry. See 15 U.S.C. §717(c).

sales to poor customers unable to pay full price.

The States do not contend that they constitutionally may engage in genuine discrimination against interstate commerce. They only seek deference to their legislative and administrative efforts to protect the legitimate needs of their citizens by exercising long-standing and well-recognized powers to distinguish between the regulated business of local distribution and other private businesses.

SUMMARY OF ARGUMENT

Numerous decisions of this and lower courts have upheld the rational basis for making precisely the distinction Ohio law makes here between regulated utilities and unregulated private businesses. No subsequent development justifies calling such well-settled doctrine into question.

Specifically, the fact of interstate pipeline deregulation at the federal level represents a trend which the States themselves are attempting to follow without sacrificing the legitimate traditional goals of regulating local distribution. Not only do the particular exigencies associated with local distribution continue to raise troubling questions in the context of deregulation, but the process of deregulation itself may necessitate new measures that distinguish between LDCs and private marketing enterprises. Indeed, the imposition of charges or other burdens on marketer transactions may become a necessary piece of the deregulation process.

ARGUMENT

States Traditionally Have Distinguished Between Public Utilities And Private Businesses For Both Regulatory And Taxation Purposes.

General Motors asserts violations of both the equal protection and commerce clauses of the Constitution because Ohio distinguishes between sales of natural gas by unregulated marketers and regulated LDCs. These contentions must overcome decisions of by this Court long establishing the validity of such distinctions. First, this Court has recognized that, because the States' taxation power constitutes such a fundamental aspect of their sovereignty, special deference is due to the manner in which the State exercises that power. The States' power to tax has been acknowledged to be "the most basic power of government." *State of Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444 (1941). This has led the Court to reject routinely equal protection challenges to State taxes on the principle that "'[t]he States have a very wide discretion in the laying of their taxes." *Allied Stores of Ohio, Inc v. Bowers*, 358 U.S. 522, 526 (1959). Indeed, "[n]o 'iron rule of equality' between taxes laid by a State on different types of business is necessary." *State of Alaska v. Arctic Maid*, 366 U.S. 199, 231 (1961).

This Court repeatedly has recognized the rational basis for separate regulation and taxation of public service corporations such as utilities and common carriers. Thus, "'the regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States.'" *New Orleans Public Service, Inc. v. City of New Orleans*, 491 U.S. 350, 365 (1989), citing *Arkansas Elec. Co-operative Corp. v. Arkansas Pub. Serv. Comm'n*,

461 U.S. 375, 377 (1983); *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 569 (1980) (holding that, under First Amendment standard for commercial speech regulation, "[t]he State's concern that rates be fair and efficient represents a clear and substantial governmental interest"). Moreover, the underlying regulatory interest of the States can furnish independent, rational grounds for specific tax measures. E.g., *Exxon Corp. v. Eagerton*, 462 U.S. 176, 196 (1983) (upholding imposition of severance tax with pass-through-prohibition upon oil producers as to intrastate transactions) ("We conclude that the measures at issue here pass muster under this standard. The pass-through prohibition plainly bore a rational relationship to the State's legitimate purpose of protecting consumers from excessive prices. Similarly, we think the Alabama Legislature could have reasonably determined that the royalty-owner exemption would encourage investment in oil or gas production. Our conclusion with respect to the royalty-owner exemption is reinforced by the fact that that provision is solely a tax measure.").

The legitimate goals of utility regulation together with the structural reasons for deferring to State tax classifications account for the relative ease this Court has had in upholding separate taxation of public service corporations and utilities. E.g., *New York Rapid Transit Corp. v. City of New York*, 303 U.S. 573, 579 (1937) ("Since carriers or other utilities with the right of eminent domain, the use of public property, special franchises or public contracts, have many points of distinction from other businesses, including relative freedom from competition, especially significant with increasing density of population and municipal expansion, these public service organizations have no valid ground by virtue of the equal protection clause to object to separate treatment related to such distinctions. Carriers may be treated as a separate

class [cites omitted] and, as such, taxed differently or additionally. [cites omitted] ..."); *Atlantic Coastline R. Co. v. Doughton*, 262 U.S. 413, 423-24 (1923) ("The state might, consistently with the equal protection clause, have subjected only public service corporations to the income tax, or it might have laid upon them a higher income tax than upon others, as it laid upon railroads a higher franchise tax than it did upon other corporations.").

In light of this jurisprudence, it is very late in the day for General Motors to assert that distinguishing between taxation of marketer sales and LDC sales has no rational basis. What General Motors needs is some way to make old, settled questions appear to be new. Realizing this, General Motors and the amici supporting its position try two strategies: (i) they dress up the equal protection argument as a commerce clause argument; and (ii) they suggest that the process of deregulation somehow strips settled classifications of rationality.

1. The Public Service Business Of Local Distribution Is A Distinct Business From The Private Business Of Marketing The Bare Commodity Of Natural Gas.

The distinction between (i) a local distribution business and (ii) a selling business not involving local distribution is not, as General Motors suggests, discrimination against interstate commerce, but a distinction between two separate businesses. This is so because facial commerce clause discrimination requires a "geographic distinction" which establishes that a tax measure "patently discriminates" against interstate commerce. *Oregon Waste Systems v. Dep't of Environmental Quality*, 128 L.Ed.2d 13,

22 (1994). The method for showing a "geographic distinction" is set forth in the preceding sentence in *Oregon Waste Systems*: the differential charge in that case "favor[ed] shippers of Oregon waste over their counterparts handling waste generated in other States." *Id.* In short, the Oregon waste--"local" waste--had an out-of-State "counterpart" that alone was subject to surcharge. The surcharge was therefore a classification based upon a geographic distinction.

General Motors cleverly uses the term "local" utility to suggest that the same situation is present here, but this is only a semantic game. A classification distinguishing "local" distribution is not a geographic distinction, because there is no "counterpart" for that distribution activity outside the State. Thus the classification does not favor an in-state activity at the expense of an out-of-state counterpart. A public natural gas utility is referred to as a "local distribution company," but this does not mean a "distribution company" that could just as easily operate "out-of-State." To the contrary: it means a company that engages in the unique and heavily regulated business of "local distribution" of an essential commodity. "Local" pertains to the level of distribution, not to the geographic identity of the company. Once the rules of the semantic game are revealed, it becomes clear that General Motors only raises an equal protection challenge--one to be rejected under the prior holdings of this Court.

In any event, no commerce clause discrimination exists unless a State law is shown to "impose[ ] a greater burden on out-of-state [interests] than it does on *similarly situated* [in-state interests]". *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 88 (1987) (emphasis added). The unique character of the business of physically supplying gas arises both from the natural fact of owning and controlling pipelines that convey gas at a certain pressure to the burner

tip and from the legal fact that that business is heavily regulated by the States. Under both of these factors, the marketers General Motors purchased from are situated differently than LDCs. Because marketers and LDCs are identifiably different businesses, "no iron rule of equality" controls the manner in which the transactions may be taxed. E.g., *State of Alaska v. Arctic Maid*, 366 U.S. 199, 231 (1961). See also *Exxon Corp. v. Governor of Maryland,* 437 U.S. 117,125-29 (1978) (no discrimination against interstate commerce based upon burden on distinct business of integrated oil companies even though such were all "out-of-State").

The difference between the local distribution business and the marketing business shapes the distinct nature of their respective sales transactions. A marketer sale is a sale of commodity (natural gas), and the sale price accordingly includes (i) the marketer's cost of acquiring gas; (ii) the marketers's profit on gas; and (iii) certain overhead costs. Like sales of tangible personal property generally, natural gas sales by marketers are subject to sales and use taxation under Ohio law. By contrast, purchasing gas from a utility means purchasing utility service--the price includes commodity (natural gas--sold at cost, since the utility is not permitted to profit on the commodity itself), plus capacity (space to transport gas on interstate pipeline), plus the utility's recovery of and return on investment in its own pipeline infrastructure, plus public service obligation costs.

The salient facts are these: (i) the utility incurs a substantially greater interstate pipeline cost because of its public service obligation to provide for "peak demand," with the result that utility customers must each help pay for that public service cost:--a cost that is "bundled" into the price of utility service; and (ii) the utility incurs additional public service costs, such as programs to defray the cost of

supplying natural gas to poor customers who cannot pay full price--which costs are also "bundled" in the service charge to utility consumers. Surely, such different business and distinct transactions merit different tax treatment. *Amerada Hess Corp. v. N.J. Taxation Div.*, 490 U.S. 66,78 (1989); *Artic Maid*, supra.

2. The "Unbundling" That Occurred In General Motors' Marketer Purchases Demonstrates The Continuing Rationality Of Separately Taxing Public Utilities.

General Motors suggests that the deregulation of interstate pipeline business at the federal level somehow creates a new constitutional bar to traditional state regulation of local distribution. Apparently, General Motors means to imply that federal deregulation instantaneously removed all traditional reasons for regulation and differential treatment by States. However, the commentators General Motors cites paint a more complicated picture:

> The PUCs confront a more daunting task than the FERC. Once the FERC creates the conditions in which markets can perform the functions of allocating and pricing gas and transportation capacity, it can simply step aside and allow those markets to function with little regulatory oversight. By contrast, the PUCs cannot realistically expect to create conditions in which competitive markets will yield acceptable results with respect to all LDC transactions. *At a minimum, provision of distribution service to small volume consumers is likely to remain a classic natural*

monopoly function for the foreseeable future. The PUCs retain the important role of protecting small consumers from potential abuse by monopolistic LDCs. Yet the PUCs cannot perform this role effectively through the use of traditional cost-of-service regulation with its reliance on inherently arbitrary allocations of common costs. The LDCs have limited market power with respect to most large consumers. Those consumers have access to competitive alternatives at varying and constantly changing prices. If a PUC insists that an LDC charge its large consumers rates determined through use of traditional cost-of-service methods, including some specified allocation of common costs, it will create a situation in which all affected parties lose. ...

... [T]he PUCs need to create incentives for the LDCs to minimize their total costs and to charge prices that maximize large consumers' contributions to common costs in order to minimize the costs that must be borne by small customers. It is not easy to devise a regulatory system that furthers all of these goals simultaneously. ... This difficult step in the transition will not be completed for many years and will have to proceed primarily by trial and error.

[R. Pierce, *The State Of The Transition To Competitive Markets In Natural Gas And Electricity*, 15 Energy L. Rev. 323, 327-28 (1994) (emphasis added).].

Federal deregulation of interstate pipeline business has itself raised new challenges at the level of local distribution.

> ...Occupying the last link in the natural gas distribution chain, end-users purchase gas on the intrastate market from the local distribution companies. The fixed costs which the LDCs incur in purchasing gas from the regulated pipelines and then reselling it to end-users was typically spread throughout their customer base (subject of course to the applicable local regulations). Under the system of "open access" however, the larger industrial end-users opted to pursue more competitively priced alternatives. ... The loss of these large "switchable" customers left the "captive" users to absorb the LDC costs as reflected in the gas rate. Such users, usually smaller industrial units or individual residences, had neither the means nor the flexibility to bypass the LDC market. Forced to receive gas from the LDCs, these remaining "captives" were exposed to large scale increases in their gas rates because they were the end-user least able to respond to price changes. Perhaps in the long run, these prices will ultimately decrease as a competitive natural gas market forces sellers to lower rates. In the meantime, however, consumers are sure to be harmed if rates increase with the lifting of regulatory controls.
>
> ...
>
> Organizations representing small customers have responded quickly to Order No. 636.

> Generally, their concerns reflect the belief that this segment of the industry is the least able to take advantage of the opportunities presented by open-access. This inherent inflexibility will not only deny captive customers the benefits of the new competitive marketplace, it will also shift onto them a disproportionate share of the transition burden. ...
>
> [J. Fagan, *From Regulation To Deregulation: The Diminishing Role Of The Small Consumer Within the Natural Gas Industry*, 29 Tulsa L. Rev. 707, 723, 727 (1994).]

General Motors' marketer purchases in this case demonstrate the points made by the commentators. By purchasing from marketers, General Motors escaped the gross receipts tax that Ohio imposes upon utility sales (which is passed through to the consumer), but incurred the use tax. Avoiding a double taxation burden on utility sales was unquestionably the original purpose of the sales and use tax exemption General Motors is challenging. The advent of marketer purchases in the 1980's vastly strengthened this rationale for exempting utility purchases. In its marketer purchases, General Motors "unbundled" its interstate pipeline capacity costs from its purchase price--the figure upon which the use tax is calculated--while at the same time evading any share of additional public service cost. By contrast, utility customers pay for these extra public service charges, and also pay the passed-through gross receipts tax on those extra charges. This situation raises the very "captive consumer" problem referred to by the commentators, whereby marketers skim off the "cream" of large, paying customers and leave behind an ever diminishing base to fund the public service functions of the utility.

The States clearly need flexibility in dealing with this situation, but General Motors in effect asserts in this case that any flexibility is unconstitutional. The *amici* States respectfully submit that their sovereign powers encompass the authority to ensure that their residents do not freeze to death in the winter. There is no constitutional bar to the exercise of such State authority where, as here, such measures place absolutely no added burden on commerce that happens to cross state lines, or in any way disfavor a product or service that happens to originate out-of-State.

CONCLUSION

For all the foregoing reasons, the *amici* States request the Court to affirm the decision of the Ohio Supreme Court.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

GENERAL MOTORS CORPORATION,

Petitioner,

v.

ROGER W. TRACY, TAX COMMISSIONER OF OHIO,

Respondent.

On Writ of Certiorari to the Supreme Court of Ohio

BRIEF OF COLUMBIA GAS OF OHIO, INC. *AS AMICUS CURIAE* IN SUPPORT OF THE RESPONDENT

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BRIEF OF COLUMBIA GAS OF OHIO, INC. AS *AMICUS CURIAE*

INTRODUCTORY STATEMENT

This brief is submitted by Columbia Gas of Ohio, Inc. as *amicus curiae* in support of Respondent Roger W. Tracy, Tax Commissioner of Ohio. Petitioner and Respondent have consented to the filing of this brief.[1]

INTEREST OF *AMICUS CURIAE*

Columbia Gas of Ohio, Inc. ("Columbia") is an Ohio corporation engaged in the distribution and sale of natural gas to approximately 1.2 million retail customers throughout the State of Ohio. Four of Columbia's sister companies provide similar gas distribution service to an additional 681,000 customers in the neighboring states of Kentucky, Pennsylvania, Maryland, and Virginia.[2] All of these companies, including Columbia, are wholly-owned subsidiaries of The Columbia Gas System, Inc., a Delaware Corporation, which is one of the largest integrated natural gas systems in the United States. Through its various subsidiaries, The Columbia Gas System is engaged in the production, transmission, and distribution of natural gas throughout much of the nation.

For commercial and industrial customers such as Petitioner, General Motors Corporation, Columbia offers

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[1] Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court pursuant to Rule 37.3 of the Rules of this Court.

[2] The four sister companies are Columbia Gas of Kentucky, Inc., Columbia Gas of Pennsylvania, Inc., Columbia Gas of Maryland, Inc., and Commonwealth Gas Services, Inc.

both gas sales and gas transportation service, and the customer is free to select either or both of these services. If the customer selects sales service, Columbia purchases gas supplies from various third party suppliers, and delivers those supplies to the customer's premises for sale. If the customer selects gas transportation service, the customer is responsible for acquiring its own gas supplies directly from natural gas producers or marketers, such as Mobil Natural Gas, Inc. or Enron Capital and Trade (formerly Access Energy Corporation), and arranging to have those supplies delivered to Columbia. Columbia then redelivers the gas to the customer's factory or business location. In either case, the gas is ultimately delivered to the customer through the same pipeline facilities of Columbia.

Since Columbia is "engaged in the business of supplying natural gas . . . to consumers," it is a "natural gas company" within the meaning of Ohio Rev. Code Ann. § 4905.03(A)(6), and is therefore a "public utility" subject to the regulatory jurisdiction of the Ohio Public Utilities Commission. Ohio Rev. Code Ann. §§ 4905.02, 4905.04, 4905.05, and 4905.06. These activities also make Columbia a "natural gas company" for purposes of Ohio Rev. Code Ann. § 5727.01(D)(4), and Columbia's sales of natural gas to retail customers are therefore exempt from the Ohio sales and use taxes by virtue of Ohio Rev. Code Ann. §§ 5739.02(B)(7) and 5741.02(C)(2).

Petitioner's central contention in this proceeding is that this exemption renders the use tax unconstitutional, in violation of both the Commerce and Equal Protection Clauses of the United States Constitution, because the tax impermissibly discriminates against "out-of-state" gas marketers, such as Petitioner's various suppliers, and in favor of "local" gas utilities, such as Columbia. Pet. Brief

9-11.[3] An *amicus* brief submitted by the Chamber of Commerce of the United States, the National Association of Manufacturers, two interstate pipelines, and a natural gas marketing company contends that this exemption also frustrates federal natural gas policy, which encourages open competition among suppliers. Amicus Brief 11-13. If Petitioner and its supporting *amici* were to prevail on those arguments, any resulting modification of the Ohio tax laws might well increase the relative tax burden borne by natural gas utilities, such as Columbia, and their customers, while decreasing the burden on competing natural gas producers and marketers. As a result, Columbia clearly has a vital interest in the outcome of this proceeding.

Columbia, like Petitioner and its supporting *amici*, strongly supports the development of a competitive, national market for natural gas, in which individual customers are permitted to choose among competing suppliers. Historically, Columbia has been a leader in developing and offering the very gas transportation programs that make such competition possible, by allowing customers such as Petitioner to purchase gas directly from third-party suppliers, rather than purchasing all of their supplies from a natural gas utility such as Columbia. In the early 1970s, Columbia offered one of the first such gas transportation programs in the nation. Today, Columbia offers gas transportation service to all of its commercial and industrial

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[3] The following abbreviations are used in this brief: "Pet. Brief" refers to the Petitioner's Brief. "Pet. Opp." refers to the Respondent's Brief in Opposition to the Petition for Certiorari. "Amicus Brief" refers to the Brief of *Amici Curiae* filed by the Chamber of Commerce of the United States, the National Association of Manufacturers, Coastal Gas Marketing Co., ANR Pipeline Company, and Colorado Interstate Pipeline Co. "J.A." refers to the Joint Appendix filed with the Court.

customers, from the largest manufacturing facility to the smallest corner drugstore or fast food restaurant, and the company is currently developing a program that would extend the benefits of gas transportation service to individual residential customers.

Columbia also opposes the imposition of discriminatory state taxes, because Columbia recognizes, as Petitioner does, that such taxes may affect customers' purchasing decisions. Columbia fully agrees that state taxes should not provide either a competitive advantage or disadvantage to *any* class of sellers, including natural gas marketers or natural gas utilities.

Columbia cannot, however, agree that the existing Ohio statutory scheme unconstitutionally discriminates against out-of-state natural gas marketers, or in favor of natural gas utilities. As more fully explained in the **Argument** section, *infra*, natural gas marketers and natural gas utilities are engaged in fundamentally different businesses. They have different rights and responsibilities, and there are significant differences in the manner in which they are permitted to sell natural gas to consumers. For example, marketers are free to sell gas at negotiated prices, while utilities must charge a regulated price which reflects a company-wide average gas cost, irrespective of the customer's size or usage characteristics. Furthermore, utilities are limited to a dollar-for-dollar pass-through of their actual gas costs, without any markup or profit. Thus, while it is true, as Petitioner contends, that marketers and utilities both sell natural gas to burner-tip customers, Pet. Brief 4, they are certainly not competing on a "level playing field," and were not doing so during the audit period in this case

(1986-90).[4] As a result of such factors, natural gas marketers and natural gas utilities are not similarly situated for purposes of the Commerce Clause, and there is nothing in the Clause that requires the state to impose identical taxes upon such entities.

In addition, Petitioner has selectively focused on the application of the Ohio use tax, while virtually ignoring all other Ohio taxes which are occasioned by the retail purchase and consumption of natural gas. When Petitioner's argument is properly analyzed in the context of *all* state taxes that apply to such transactions, including the various revenue-based taxes that apply to gas utilities in lieu of the use tax, it is apparent that the Ohio statutes neither discriminate against nor burden sales of natural gas by out-of-state gas marketers, and therefore violate neither the Commerce Clause nor the equal protection rights of such marketers.

SUMMARY OF ARGUMENT

The complementary sales and use taxes imposed under Ohio Rev. Code Ann. §§ 5739.02 and 5741.02 are facially neutral and exhibit no intent to discriminate against interstate commerce. These taxes are applied on a uniform basis, irrespective of where the gas originates or where the customer takes title to that gas. A retail customer purchasing gas from an out-of-state marketer will

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[4] Amended Substitute House Bill 476, which was signed into law by the Governor of Ohio on June 18, 1996, will allow gas utilities to make unregulated sales of gas under certain circumstances, but the provisions of that law have not yet been implemented, and in any event, they have no bearing upon events that occurred during the audit period.

pay exactly the same tax as a similarly situated customer purchasing gas from a marketer located in Ohio.

The exemption from the use tax for sales by natural gas companies is likewise facially neutral and exhibits no discriminatory intent. It is based solely upon the nature of the seller's business, and not upon any factors relating to interstate commerce.

Finally, the record fails to show that the existing Ohio statutory scheme either favors natural gas utilities or has a discriminatory effect which burdens out-of-state gas marketers. Ohio imposes a series of revenue-based taxes on natural gas utilities that are as onerous, if not more so, than the use tax imposed upon gas purchased from out-of-state marketers. This effectively negates any claim that the existing statutes violate either the Commerce Clause or the equal protection rights of Petitioner's suppliers.

ARGUMENT

A. Ohio's comprehensive statutory scheme for taxing the sale and use of natural gas neither discriminates against nor burdens interstate commerce, and therefore does not violate the Commerce Clause of the United States Constitution.

The Commerce Clause, which is contained in Article I, section 8, of the United States Constitution, provides that "[t]he Congress shall have Power . . . To regulate Commerce . . . among the several States . . ." It is now well-established that the Commerce Clause not only grants Congress the affirmative power to regulate interstate commerce; it also prohibits the states from engaging in "economic protectionism" designed to benefit

in-state economic interests while burdening out-of-state competitors. *New Energy Co. of Indiana* v. *Limbach*, 486 U.S. 269, 273 (1988). In particular, no state may impose a tax which discriminates against interstate commerce by providing a direct commercial advantage to local business. *Boston Stock Exchange* v. *State Tax Commission*, 429 U.S. 318, 329 (1977). A state tax may violate the Commerce Clause if it is facially discriminatory, has a discriminatory intent, or has the effect of unduly burdening interstate commerce. *Amerada Hess Corp.* v. *Director, Div. of Taxation*, 490 U.S. 66, 75 (1989).

Petitioner argues that the use tax imposed under Ohio Rev. Code Ann. § 5741.02 violates the Commerce Clause, because it discriminates against sales by out-of-state gas marketers, and in favor of sales by "local" gas utilities. The Ohio Supreme Court rejected that argument. *General Motors Corp.* v. *Tracy*, 652 N.E.2d 188 (Ohio 1995). For the reasons set forth herein, Columbia contends that the Ohio Supreme Court's decision was correct and urges this Court to affirm that decision.

1. The complementary sales and use taxes imposed under §§ 5739.02 and 5741.02 of the Ohio Revised Code are facially neutral and exhibit no intent to discriminate against interstate commerce.

Ohio, like most states, imposes complementary sales and use taxes on the purchase or subsequent use of tangible personal property, including natural gas. If a sale of gas occurs within Ohio, the state imposes a 5% sales tax on the transaction. Ohio Rev. Code Ann. §§ 5739.02 and 5739.025. If the sale occurs outside the state but the gas is ultimately consumed within Ohio, the state levies a 5%

percent use tax on the "storage, use, or other consumption" of gas which occurs within the state. Ohio Rev. Code Ann. §§ 5741.02 and 5739.025. (Local governments are permitted to levy certain additional taxes which increase the rate of the sales and use taxes.) The sales and use taxes are "complementary" in the sense that the use tax does not apply to any transaction upon which the sales tax has been imposed and paid. Ohio Rev. Code Ann. § 5741.02(C)(1). As a result, the sales and uses taxes, taken together, are facially neutral and are applied in a non-discriminatory manner. Customers purchasing natural gas will pay exactly the same tax (whether denominated as a sales or use tax) irrespective of where the gas originates, where they took title to the gas, or whether they purchased that gas from a local or out-of-state supplier. In this respect, the Ohio sales and use taxes are virtually identical to the Washington sales and use taxes which this Court upheld almost sixty years ago in *Henneford* v. *Silas Mason Co.*, 300 U.S. 577 (1937).

The use tax does not apply to gas sold by natural gas utilities (which are statutorily defined as "natural gas companies"), Ohio Rev. Code Ann. §§ 5727.01(D)(4), 5739.02(B)(7) and 5741.02(C)(2), but that exemption is likewise facially neutral. It applies to *all* sales of gas by such companies, irrespective of where the gas originated, where the utility took title to the gas, or whether that gas was acquired from a local or out-of-state supplier. As a result, the exemption neither taxes a transaction or incident more heavily when it crosses a state line, *Armco Inc.* v. *Hardesty*, 467 U.S. 638, 642 (1984), nor otherwise discriminates on the basis of some "interstate element." *Boston Stock Exchange* v. *State Tax Commission*, 429 U.S. 318, 332 (1977). The exemption is based solely upon the nature of the

seller's business, and not upon any factors relating to interstate commerce.

Petitioner nonetheless argues that the exemption for sales by natural gas utilities facially discriminates against interstate commerce, because it provides a direct commercial advantage to local business. Pet. Brief 9, 17. Although the exemption is not facially discriminatory in the typical sense, because "there is no explicit discriminatory design" which favors local businesses, *Amerada Hess Corp.* v. *Director, Div. of Revenue*, 490 U.S. 66, 76 (1989), Petitioner contends that the exemption necessarily favors local businesses, because under Ohio law, the definition of a "natural gas company" is limited to companies that "own or operate the transportation and distribution equipment and deliver the natural gas to consumers in Ohio." Pet. Brief 6. While the definition of a "natural gas company" is, in fact, limited to such entities, it does not follow that the use tax impermissibly discriminates against interstate commerce.

In considering claims of discrimination under the Commerce Clause, it is necessary to compare entities that are similarly situated. *Kraft General Foods* v. *Iowa Dept. of Revenue and Finance*, 505 U.S. 71, 80 (Fn. 23) (1992); *CTS Corp.* v. *Dynamics Corp. of America*, 481 U.S. 69, 88 (1987); *Halliburton Oil Well Cementing Co.* v. *Reily*, 373 U.S. 64, 70 (1963). If taxpayers are engaged in different businesses, they are not similarly situated for purposes of the Commerce Clause, and the Clause imposes no "iron rule of equality" with respect to taxes assessed on different types of businesses. *Alaska* v. *Arctic Maid*, 366 U.S.199, 205 (1961).

This principle is perhaps best illustrated by the Court's recent decision in *Amerada Hess Corp.* v. *Director, Div. of Taxation*, 490 U.S. 66 (1989). In that case, several oil

producers challenged an "add-back" provision of the New Jersey Corporation Business Tax Act that prohibited them from deducting, for state tax purposes, the Windfall Profit Tax that they paid to the federal government. The adverse effect was limited to oil producers, since the Windfall Profit Tax did not apply to oil retailers or other entities. Furthermore, since there are no oil reserves in New Jersey, all of the activities that gave rise to the adverse impact of the challenged tax provision necessarily took place outside the state, and purely "local" businesses were not affected. The oil producers argued that the add-back provision therefore violated the Commerce Clause, because it discriminated against oil producers who market their oil and in favor of independent retailers who do not produce oil. The Court rejected that contention. Even though the producers and retailers were obviously competitors engaged in the sale of the same product, the Court found that the add-back provision did not discriminate against interstate commerce, because any differences in the effect of that provision resulted "solely from differences between the nature of their businesses, not from the location of their activities." 490 U.S. at 78.

The Court reached similar conclusions in *Alaska* v. *Arctic Maid*, 366 U.S. 199 (1961) and *Dunbar-Stanley Studios* v. *Alabama*, 393 U.S. 537 (1969). *Arctic Maid* involved a tax which Alaska had imposed on "freezer ships" operating in territorial waters off its coast. The freezer ships gathered fish which had been caught by their own "catcher boats" or by independent operators; froze the fish; and then transported them to out-of-state locations for canning. Since Alaska imposed no similar tax on salmon caught and frozen in Alaska for delivery to local canneries, the tax was challenged on the grounds that it violated the Commerce Clause by discriminating against the freezer

ships. The Court rejected that challenge. Noting that the Commerce Clause imposes no strict rule of equality with respect to taxes assessed on different types of businesses (and also noting that local canneries paid an even higher tax than the freezer ships), the Court held that any difference between the taxes imposed upon the freezer ships and their competitors was not so "palpably disproportionate . . . as to run afoul of the Commerce Clause." 366 U.S. at 205.

In *Dunbar-Stanley Studios*, the State of Alabama imposed a tax of three to five dollars per week on transient or traveling photographers (depending upon the size of the towns in which they were operating), and twenty-five dollars per year on photographers operating in fixed locations. The fixed-location photographers (like Ohio's gas utilities) were necessarily located within the state, while at least some of the transient photographers were engaged in interstate travel. A photography firm challenged the tax on transient photographers, claiming that it discriminated against interstate commerce. The Court rejected that claim, noting that the tax applied equally to transient photographers who were engaged in interstate travel and those who traveled solely within the state. The Court also found no evidentiary basis upon which to conclude that the tax on out-of-state transient photographers was so disproportionate to the tax imposed on fixed-location photographers as to "bear unfairly on the former." 393 U.S. at 542. The Court went on to suggest that even if the tax on transient photographers had amounted to *twice* the tax imposed upon those operating in fixed locations, the tax might not have been unconstitutional, "given the differences between the two ways of carrying on the business." *Id.* (Fn. 5).

The fundamental principle that emerges from *Amerada Hess, Arctic Maid*, and *Dunbar-Stanley Studios* is that a state may, without violating the Commerce Clause, impose different taxes upon different types of businesses. This is true even if the entities are competitors who sell the same product (oil), provide the same service (taking photographs), or engage in the same commercial activity (gathering and transporting fish for canning).[5] That principle is directly relevant here. Despite the fact that natural gas utilities and natural gas marketers sell the same product to the same customers, they are engaged in fundamentally different businesses.

Natural gas utilities are classified as public utilities, and their rates, services, and operations are therefore subject to extensive regulation. *See generally*, Ohio Rev. Code Ann. Chapters 4905 and 4909. Natural gas marketers are not classified as public utilities, *Chrysler Corp.* v. *Tracy*, 652 N.E.2d 185 (Ohio 1995); *Yankee Resources, Inc.*, Case No. 82-1086-GA-ARJ (Ohio Pub. Util. Comm. Sep. 9, 1982) (unreported) (Pet. Opp. 2a-5a), and face no similar regulatory constraints.

Natural gas utilities are legally obligated to serve the public, without discrimination, throughout their field of operations. *Industrial Gas Co.* v. *Public Utilities Comm.*, 21 N.E.2d 166 (Ohio 1939). Natural gas marketers are free to select their own customers. J.A. 199.

Natural gas utilities may charge only those rates which have been found to be "just and reasonable" by the Ohio Public Utilities Commission, and cannot change those

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[5] In this regard, *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263 (1984), cited by Petitioner, is clearly distinguishable. The tax in that case discriminated among entities who were engaged in the *same* business, i.e., the sale of liquor at wholesale.

rates without formal regulatory approval. *General Telephone Co.* v. *Public Utilities Comm.*, 181 N.E.2d 698 (Ohio 1962); Ohio Rev. Code Ann. §§ 4905.22, 4905.32, 4909.15, and 4909.17. Their rates are set using a statutory formula, which is based on the cost of providing service plus a "fair and reasonable" return on investment. Ohio Rev. Code Ann. § 4909.15. With respect to one major category of expense, the cost of obtaining natural gas supplies for their customers, natural gas utilities are limited to a dollar-for-dollar pass-through of those costs without any markup or profit. Ohio Rev. Code Ann. § 4905.302; Ohio Adm. Code Chapter 4901:1-14. Furthermore, the sales price charged by natural gas utilities must reflect a single, average cost of gas, irrespective of the customer's size or usage characteristics. *Id.* Natural gas marketers, on the other hand, are free to negotiate their prices and other contract terms on a case-by-case basis, J.A. 199-200, and may earn whatever profit the market allows.

Natural gas utilities, like state and local governments, may use the power of eminent domain to appropriate private property where necessary to fulfill their public service obligations. Ohio Rev. Code Ann. § 1723.01. Natural gas marketers have no such power. J.A. 201. Natural gas utilities typically hold franchises granted by municipal governments, which allow their pipelines and other facilities to occupy the streets and public rights-of-way. Natural gas marketers own no such facilities (J.A. 202), and hold no such franchises.

Natural gas utilities must administer extensive social programs, such as the Percentage of Income Payment Plan, which help to assure continued service to low-income customers by limiting the utilities' ability to disconnect service for nonpayment. Ohio Admin. Code Chapter 4901:1-18.

Natural gas marketers are free to terminate service in accordance with the terms of their contracts.

In short, natural gas utilities are heavily regulated businesses with special rights and responsibilities that are not shared by the general business community. They face significant regulatory constraints on the manner in which they are permitted to sell natural gas to consumers. Natural gas marketers, on the other hand, are essentially unregulated commodity merchants. By any reasonable measure, these entities represent two very different types of businesses. As a result, there is absolutely nothing in the Commerce Clause that requires Ohio to impose identical taxes upon such entities, and the exemption of natural gas companies from the Ohio use tax does not facially discriminate against interstate commerce. Any differences in the resulting tax treatment result "solely from differences between the nature of their businesses, not from the location of their activities." *Amerada Hess Corp.*, 490 U.S. at 78.[6]

In addition, the Ohio statutes exhibit absolutely no evidence of discriminatory intent. The Ohio General Assembly could not have been motivated by any intent to discriminate against out-of-state gas marketers when it first exempted sales by natural gas companies from the use tax, because that exemption has existed since the sales and use taxes were first enacted in 1935, several decades before the availability of gas transportation programs allowed

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[6] Although Petitioner maintains that the location of the exempt seller *is* the determinative factor for purposes of the sales and use taxes, Pet. Brief 19 (Fn.15), this is clearly not the case. If the location *was* determinative, the sales tax would not apply to sales by in-state natural gas marketers. That alone demonstrates that the determinative factor is the nature of the seller's business, and not the seller's location.

customers to purchase gas from marketers instead of natural gas utilities. 116 Ohio Laws 41, 43-44, 101, 102-3 (1935).

Nor is the exemption for natural gas utilities motivated by any desire to exert pressure on out-of-state marketers to conduct their business in Ohio, *Amerada Hess*, 490 U.S. at 77-78, since such sales would still be subject to an equal sales tax. The only way that out-of-state marketers could avoid the imposition of the sales or use tax on the gas that they sell is to get into an entirely new line of business by becoming public utilities.

Petitioner further argues that the taxability of a sale or purchase depends not on the character of the seller as a public utility, but on whether the seller owns distribution equipment and facilities within the state and uses such equipment and facilities to deliver gas to consumers. Pet. Brief 6. That argument misses the point, because the two are basically inextricable. Under Ohio law, it is the ownership or operation of such facilities, and the use of those facilities to deliver gas to consumers, that causes an entity to be characterized as a public utility. *Chrysler Corp.* v. *Tracy*, 652 N.E.2d 185 (Ohio 1995).

Finally, Petitioner argues that the use tax exemption for natural gas utilities discriminates against goods which are delivered into the state by "common carriage" rather than by the seller's own distribution network. Pet. Brief. 21-22. That argument also misses the point, because natural gas is delivered through the same interstate pipelines and local distribution facilities whether it is sold by natural gas marketers or natural gas utilities. Since Petitioner has effectively conceded as much, Pet. Brief 25, that argument should be rejected.

For the foregoing reasons, Columbia submits that the Ohio sales and uses taxes are facially neutral, that they

exhibit no discriminatory intent, and that the exemption for natural gas utilities is based solely upon the nature of their business, and not upon factors relating to interstate commerce. It was essentially upon this basis that the Ohio Supreme Court rejected Petitioner's claim:

> We have before us purchases by GM of natural gas from a company that does not own any production, transportation, or distribution equipment. The commissioner claims that he would tax purchases from these persons whether they sold gas in-state or out-of-state. Thus, the commissioner's application of the statute does not benefit in-state purchasers by favoring in-state vendors over out-of-state vendors; *he treats purchases from both the same.*

652 N.E.2d at 190 (emphasis supplied). In other words, the court found that the Ohio statutes did *not* discriminate against interstate commerce, because all similarly situated sellers were treated alike. Since the Constitution requires nothing more, the court's judgement should be affirmed.[7]

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[7] Petitioner and its supporting *amici* argue at great length that the Ohio Supreme Court improperly upheld the use tax, despite its discrimination against interstate commerce, because the tax also burdened a portion of *intrastate* commerce. Pet. Brief 11-17; Amicus Brief 10-11; Brief of Process Gas Consumers Group and Natural Gas Supply Association 11-13. That mischaracterizes the court's decision. What the court found was that the use tax did *not* discriminate against interstate commerce, and therefore, did not violate the Commerce Clause.

2. The record fails to show that the Ohio statutory scheme has the effect of unduly burdening interstate commerce.

Even if a tax is facially neutral, it may be deemed to violate the Commerce Clause if it has a discriminatory effect which unduly burdens interstate commerce. *Amerada Hess Corp.* v. *Director, Div. of Revenue*, 490 U.S. 66, 75 (1989). Since it is actual, and not hypothetical, discrimination that violates the Commerce Clause, *Associated Industries of Mo.* v. *Lohman*, 114 S.Ct. 1815, 1824 (1994), this is essentially a question of fact, upon which the Petitioner has the burden of proof. *Norton Co.* v. *Department of Revenue*, 340 U.S. 534, 537 (1951) ("[A] taxpayer claiming immunity from a tax has the burden of establishing his exemption."); *Gregg Dyeing Co.* v. *Query*, 286 U.S. 472, 481 (1932) ("Appellants had the burden of showing an injurious discrimination against them because they bought their gasoline outside the State.") Petitioner has clearly failed to sustain that burden.

The major flaw in Petitioner's analysis is that it focuses exclusively on the Ohio use tax, while virtually ignoring the other Ohio taxes which are occasioned by the sale and consumption of natural gas. The use tax cannot be viewed in isolation. As the Court held in *Gregg Dyeing Co.* v. *Query*, 286 U.S. 472, 480:

> There is no demand in [the] Constitution that the State shall put its requirements in any one statute. It may distribute them as it sees fit, if the result, taken in its totality, is within the State's constitutional power.

A proper analysis, therefore, "must take the whole scheme of taxation into account," *Halliburton Oil Well Cementing*

Co. v. *Reily*, 373 U.S. 64, 69 (1963) (internal quotation marks omitted), including taxes which are imposed upon natural gas utilities in lieu of the use tax.

Petitioner, moreover, cannot "establish discrimination by showing merely that the [different taxing] statutes are different in form or adopt a different measure or method of assessment . . . " *Interstate Busses Corp.* v. *Blodgett*, 276 U.S. 245, 251 (1928). This Court is "not concerned with what the tax is called but with what the statute does." *Gregg Dyeing Co.*, 286 U.S. at 478. Furthermore, the Court's ultimate decision is "not dependent upon the form of a taxing scheme, or upon the characterization of it by the state court." *Id.* at 476. Instead, "the controlling test is found in the operation and effect of the statute as applied and enforced by the State." *Id.* In other words, for purposes of the Commerce Clause, the critical consideration is the bottom-line economic impact upon taxpayers. As the Court explained more recently in *Halliburton Oil Well Cementing Co.* v. *Reily*, 373 U.S. 64, 70, "equality for the purposes of competition and the flow of commerce is measured in dollars and cents, not legal abstractions." It is therefore essential to evaluate the Ohio use tax in the context of *all* state taxes which are occasioned by the retail sale and consumption of natural gas.

As previously explained, a customer who purchases natural gas from a natural gas marketer will pay either the sales or use tax, depending upon whether the sale occurred within or outside the state. If, on the other hand, the customer purchases gas from a natural gas utility, the sales and use taxes do not apply, but the state imposes three different taxes upon the "gross receipts" derived from that sale: (1) a public utility excise tax (Ohio Rev. Code Ann. §§ 5727.30, 5727.38); (2) a PUCO maintenance tax, to fund

the operations of the Ohio Public Utilities Commission (Ohio Rev. Code Ann. § 4905.10); and an OCC maintenance tax, to fund the operations of the Ohio Office of Consumers' Counsel (Ohio Rev. Code Ann. § 4911.18) (hereinafter collectively "the gross receipts taxes") .

It has long been clear, moreover, that these gross receipts taxes are imposed in lieu of the sales and use taxes, and *vice versa*. As the Ohio Supreme Court explained in *Haefner* v. *City of Youngstown*, 68 N.E.2d 64 (Ohio 1946):

> A reason for exempting sales by public utilities [from the sales and use taxes] is found in the fact that their gross receipts are subject to a state excise tax . . .
>
> [T]he whole legislative course shows an intent to avoid double taxation of receipts whether they come from sales proper or are the "gross receipts" of utilities that are subject to the excise tax . . .

68 N.E.2d. at 66, 67.

The public utility excise tax is imposed at a nominal rate of 4.75% (Ohio Rev. Code Ann. § 5727.38), while the PUCO and OCC maintenance taxes fluctuate from year to year, depending upon the amounts appropriated by the Ohio General Assembly to fund the activities of those agencies. The current rate of the PUCO maintenance tax is .1299% (for the 1995 tax year) and the current rate of the OCC maintenance tax is .0310%. During the audit period under review in this case (1986-90), the PUCO maintenance tax ranged from a low of .1031% in 1986 to a high of .1230 % in 1989, while the OCC tax ranged from a low of .0286% in 1986 to a high of .0344% in 1988. The specific

rates for each year in the audit period are set forth in the margin.[8]

At first glance, it might appear that the use tax is still more burdensome, because the total current rate of the gross receipts taxes (4.91%) is still less than the 5% base rate for the use tax. It is important, however, to distinguish between the nominal rates of these taxes and the actual, effective rates as they apply to specific taxpayers. There are three major factors that alter the effective rates.

The first is the "tax on tax" effect that one encounters with any revenue-based tax, which serves to increase the effective rate of the gross receipts taxes. Although this concept may seem somewhat esoteric, it can be illustrated with a fairly straightforward example. If Petitioner were to purchase one hundred dollars worth of natural gas from a natural gas marketer in Texas for ultimate consumption at its manufacturing plants in Ohio, a 5% use tax ($5.00) would be assessed as a result of the transaction (assuming that local governments had not levied any additional taxes). When the $5.00 was paid, the transaction would be complete, and Petitioner would owe no further tax.

If, on the other hand, Petitioner purchased the same quantity of gas from a gas utility, such as Columbia, at the same price ($100.00), the State would assess gross receipts taxes totaling 4.91% (at current tax rates) on the revenues collected by the utility for that sale, and the utility would

[8] The PUCO and OCC maintenance tax rates (in percentages) for the audit period were as follows:

	1986	1987	1988	1989	1990
PUCO	.1031	.1171	.1224	.1230	.1191
OCC	.0286	.0320	.0344	.0333	.0343

owe the State $4.91 in tax. However, when the utility collected the additional $4.91 from Petitioner in order to cover that tax expense, that $4.91 would itself become part of the utility's taxable gross receipts, and the utility would then owe an additional 4.91% of that $4.91, or $.24. In order to make the utility whole and permit it to recover the total tax expense incurred in providing service, the total amount of revenue collected for the sale ($100.00) must be increased by an amount equal to the original gross receipts ($100.00) multiplied by the quantity of 1/1-T, where T equals the nominal rate of the gross receipts taxes (4.91%). Although this process may seem complex, this is precisely how the Ohio Public Utilities Commission sets utility rates in order to allow utilities to recover the various gross receipts taxes from their customers. In this particular instance, the calculation produces an *effective* rate of the gross receipts taxes of 5.16%, which exceeds the base rate of the use tax imposed by the State on gas supplied by out-of-state gas marketers. One can make similar calculations for each year in the audit period. The lowest effective rate was 5.13% for 1986, which still exceeds the base rate for the use tax.[9]

The second such factor involves the base upon which the various taxes are calculated. When utilities sell gas to

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[9] The calculation of the 5.16% effective rate of the gross receipts taxes can be mathematically verified as follows, assuming an original purchase price of $100.00:

Total Amount Collected from Customer (assuming 5.16% effective tax rate)	105.16
PUCO Tax (.001299 × .105.16)	−.14
OCC Tax (.000310 × 105.16)	−.03
Pub. Util. Excise Tax (.0475 × 105.16)	−4.99
Original Purchase Price (unadjusted for taxes)	100.00

consumers, they do so on a "bundled" basis, which means that the sales price includes all costs of obtaining and delivering that gas to the utility, including the transportation charges of interstate pipeline companies. Ohio Admin. Code Rule 4901:1-14-01(I). The gross receipts taxes apply to the entire amount, including those transportation charges. Marketers, on the other hand, have the option of delivering gas to a customer at a receipt point outside Ohio, allowing title to pass at that point, and then having the customer to contract directly with the interstate pipelines for delivery of the gas. J.A. 141-42, 210-11. The record shows that Petitioner and its suppliers have, in fact, utilized that option; Petitioner has purchased gas from marketers; taken title to the gas outside the State of Ohio; and contracted directly with interstate pipelines for the delivery of that gas. *Id., see also,* J.A. 23-4, 30. In those instances, the "price" of the gas, upon which the use tax is calculated, would *not* include the interstate pipeline transportation charges, because it does not include delivery charges incurred after title has passed to the purchaser. Ohio Rev. Code Ann. § 5739.01(H); Ohio Admin. Code Rule 5703-9-26. While the exact effect of this exclusion cannot be calculated from the record in this case, it obviously serves to decrease the effective rate of the use tax, *vis-a-vis* the gross receipts taxes.

The third such factor is the "manufacturers' use exemption," which also serves to decrease the effective rate of the use tax. If Petitioner were to purchase its gas supplies from a gas utility, such as Columbia, the gross receipts taxes would apply to *all* revenues derived from those sales, irrespective of how Petitioner used the gas. The use tax, on the other hand, does not apply to any gas which Petitioner uses "primarily in a manufacturing operation to produce tangible personal property for sale." Ohio Rev. Code Ann.

§§ 5739.01(E)(9), 5739.011(B)(8), and 5741.02(C)(2); J.A.73. Although Petitioner characterizes this exemption as "a minor exception not relevant to this case," Pet. Brief 6, the evidentiary record indicates that the volume of gas subject to this exemption is "[p]robably the majority" of Petitioner's usage. J.A. 74. If one conservatively estimates that 50% of Petitioner's gas usage is subject to the manufacturers' use exemption, the *effective* rate of its use tax would not exceed 3.5%, even if additional taxes imposed by local governments produced a nominal use tax rate of 7%, which Petitioner concedes to be the maximum permitted by Ohio law. Pet. Brief 5. Since an effective rate of 3.5% is considerably lower than even the nominal rate of the public utility excise tax (4.75%), it is apparent that the use tax does not discriminate against sales of gas by out-of-state marketers, and therefore does not burden interstate commerce.[10]

Petitioner essentially argues that the various gross receipts taxes imposed upon natural gas utilities cannot be considered in this analysis, because they fail to qualify as "compensatory taxes" under the test enunciated in *Fulton Corp.* v. *Faulkner*, 116 S.Ct. 848 (1996). Pet. Brief 17-18. That argument should be rejected.

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[10] Columbia is aware of the Court's reluctance to engage in detailed examinations of relative tax burdens, especially where it requires complex economic analyses. *Fulton Corp.* v. *Faulkner*, 116 S. Ct. 848, 859 (1996); *Associated Industries of Mo.* v. *Lohman*, 114 S. Ct. 1815, 1825 (Fn. 5) (1994). The analysis presented here, however, can be performed using only the existing tax rates, the evidence in the record, and some basic arithmetic. Such an analysis is essential, moreover, if the ultimate decision is to be based upon "dollars and cents," and not "legal abstractions." *Halliburton Oil Well Cementing Co.* v. *Reily*, 373 U.S. 64, 70 (1963).

To begin with, the *Fulton* test is not applicable to the facts of this case, because it applies only where a state tax facially discriminates against interstate commerce. In cases such as this, where the challenged tax is not facially discriminatory (or even arguably not so), but where taxes on interstate commerce are imposed *in lieu* of taxes on intrastate commerce, the Court applies a "somewhat different standard." *Fulton*, 116 S.Ct. at 854 (Fn. 2). Under that standard, the challenged tax is upheld if it constitutes the "just equivalent" of the tax in lieu of which it is imposed. *Railway Express Agency* v. *Virginia*, 358 U.S. 434, 436 (1959); *Postal Telegraph Cable Co.* v. *Adams*, 155 U.S. 688, 696-97 (1895); *see also*, W. Hellerstein, *Complementary Taxes as a Defense to Unconstitutional State Tax Discrimination*, 39 Tax Lawyer 405, 420-22 (1986).

In *Railway Express Agency*, for example, this Court upheld a Virginia franchise tax on express companies engaged in interstate commerce that had been imposed "in lieu of all other property taxes on intangibles and rolling stock." 358 U.S. at 435. The taxpayer argued that the new franchise tax, which amounted to $139,739.66, was not the "just equivalent" of the tax in lieu of which it was imposed, because that tax, which applied only to rolling stock and cash, would have yielded just $679.77. The Court rejected that argument on the grounds that the new franchise tax was "not only in lieu of the previous tax on rolling stock and cash on hand," but also reached "intangible rights of great value . . . " 358 U.S. at 445. In doing so, moreover, the Court made it clear that precise mathematical equivalence was not required:

> [W]e will not inquire into the exactitudes of the formula where appellant has not shown it be so baseless as to violate due process.

358 U.S. at 436. Under that standard, the Ohio use tax clearly constitutes the "just equivalent" of the gross receipts taxes, and the use tax should therefore be sustained.

Assuming, however, for the sake of argument, that the *Fulton* test applies, the Ohio gross receipts taxes clearly satisfy the requirements of that test. In *Fulton*, the Court held that even a facially discriminatory tax may survive Commerce Clause scrutiny if it is truly a "compensatory" tax designed to make interstate commerce bear a burden already borne by intrastate commerce. 116 S.Ct. at 854. The Court then outlined the three conditions necessary for a valid compensatory tax. First, the state must identify the intrastate tax burden for which it is attempting to compensate. Second, the tax on interstate commerce must "roughly approximate," but not exceed, the tax on intrastate commerce. And third, the taxes must be imposed on "substantially equivalent" events. *Id.*, at 854-55.

Petitioner first argues that the public utility excise tax fails the second prong of the *Fulton* test because it is imposed at a nominal rate of 4.75%, while the use tax, which applies to gas sold by out-of-state marketers, is imposed at a higher base rate of 5% (with a possible addition of up to 2% by local governments). Pet. Brief 17-18. That argument (which completely ignores both the PUCO and OCC maintenance taxes) fails to recognize the difference between the nominal and effective tax rates. As previously explained, the effective rate of the gross receipts taxes significantly exceeds the effective rate of the use tax (under the facts shown on the record of this case), even if a local government were to increase the use tax by the maximum amount permitted by law.

Petitioner also argues that the public utility excise tax fails the third prong of the *Fulton* test, because the excise

and use taxes are imposed upon different entities (the customer in the case of the use tax; the utility in the case of the public utility excise tax), and therefore cannot fall on substantially equivalent events. Pet. Brief 17-18. Although actual incidence upon the same class of taxpayers is essential to a finding that two taxes are complementary, the Court has recognized that there are instances in which the nominal and actual incidences of a tax fall upon different entities. *Fulton Corp.*, 116 S.Ct. at 858. The most obvious example occurs where a "nominal taxpayer can pass [the tax] through to other parties, like consumers." *Id.*

That is precisely the situation here. As two noted authorities have explained, "[w]here public utilities are concerned . . . the tax burden is shifted to consumers through the rates charged for service. This results from the fact that regulatory law and commission practice require taxes payable to be recognized as proper costs of service." P. Garfield and W. F. Lovejoy, Public Utility Economics 392 (1964). Under Ohio law, the gross receipts taxes are included in utility rates along with other operating expenses, and any increases in tax expense resulting from increases in the public utility excise tax rate may be recovered by utilities through a separate tariff filing outside the normal rate case process. Ohio Rev. Code Ann. §§ 4909.15 and 4909.161. This is clearly enough to shift the actual incidence of these taxes from the utility to the consumer, and to satisfy the third prong of the *Fulton* test by showing that the "real taxpayers are within the same class . . . " 116 S.Ct. at 858.

Moreover, it is abundantly clear, from a practical standpoint, that the sales and use taxes and the gross receipts taxes fall upon substantially equivalent events: the

purchase and consumption of natural gas by retail customers. In all cases, these taxes are applied to the receipts from retail sales of natural gas, "whether they come from the sales proper or are the 'gross receipts' of utilities that are subject to the excise tax . . . " *Haefner* v. *City of Youngstown*, 68 N.E. 2d. at 67.[11] To suggest otherwise is to ignore economic reality (since the customer ultimately pays the tax in all cases) and to base one's determination on "legal abstractions," rather than "dollars and cents." *Halliburton Oil Well Cementing Co.* v. *Reily*, 373 U.S. 64, 70.[12] Therefore, if the Court finds that the *Fulton* test is applicable to the facts of this case, it should likewise find that both the public utility excise tax and the other gross receipts taxes assessed upon public utilities are "compensatory taxes" that fully satisfy the requirements of that test.

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[11] In this regard, the Ohio gross receipts and use taxes are clearly distinguishable from the taxes challenged in other recent cases, which applied to events that were *not* substantially equivalent, such as earning income and disposing of waste, *Oregon Waste Systems* v. *Department of Environmental Quality*, 114 S.Ct. 1345 (1994), manufacturing and wholesaling tangible goods, *Tyler Pipe Industries* v. *Washington State Dept. of Revenue*, 483 U.S. 232 (1987), *Armco Inc.* v. *Hardesty*, 467 U.S. 638 (1984), and the severance of natural resources from the soil and the use of resources imported from other states. *Maryland* v. *Louisiana*, 451 U.S. 725 (1981).

[12] To assure comparability, Columbia has deliberately limited this analysis to transaction-based taxes which are occasioned by the purchase and consumption of natural gas. Columbia has not, for instance, addressed the state's general property tax (which is assessed upon gas utilities at a rate which is more than three times the rate assessed upon other, non-utility businesses) (Ohio Rev. Code Ann. § 5727.111(C)), or other taxes, such as the assessment used to fund the state's pipeline safety operations (Ohio Rev. Code Ann. § 4905.92), which applies to natural gas utilities but not to natural gas marketers or other businesses that do not own or operate pipeline facilities.

In conclusion, Petitioner has failed to sustain its burden of showing that "whatever distinction there existed in form, there was any substantial discrimination in fact." *Gregg Dyeing Co.* v. *Query*, 286 U.S. at 482. There is no basis, on the record of this case, for concluding that the existing Ohio statutory scheme discriminates against out-of-state gas marketers or in favor of local natural gas utilities. If anything, it does just the opposite. Since there is no basis in the Commerce Clause for invalidating a tax which discriminates against an *intrastate* entity, Petitioner's Commerce Clause claim should be rejected.

B. The Ohio statutory scheme does not violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

Petitioner also claims that the Ohio use tax violates the Equal Protection Clause of the Fourteenth Amendment. This argument, like Petitioner's Commerce Clause claim, is predicated upon the contention that the use tax discriminates against out-of-state marketers and in favor of "local" public utilities.

Assuming, *arguendo,* that Petitioner has standing to assert such a claim (even though Petitioner is clearly not an out-of-state marketer, and is therefore not a member of the supposedly disadvantaged class), that argument also fails for the reasons set forth in the preceding section. Petitioner has failed to show that the existing Ohio statutory scheme, as applied to the facts of this case, either discriminates against out-of-state gas marketers or in favor of natural gas utilities. The Ohio Supreme Court properly rejected that argument, and its judgement should be affirmed.

CONCLUSION

For the foregoing reasons, Columbia urges the Court to reject the arguments presented by Petitioner and its supporting *amici*, and affirm the judgement of the Ohio Supreme Court.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

General Motors Corporation,
Petitioner,

v.

Roger W. Tracy, Tax Commissioner of Ohio,
Respondent.

On Writ of Certiorari to the Supreme Court of Ohio

Brief of *Amicus Curiae* Multistate Tax Commission In Support of Respondent

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BRIEF OF *AMICUS CURIAE* MULTISTATE TAX COMMISSION IN SUPPORT OF RESPONDENT[1]

INTEREST OF *AMICUS CURIAE*

The Multistate Tax Commission is the administrative agency formed by the MULTISTATE TAX COMPACT. Historically, the COMPACT was developed through the cooperative efforts of the States and multistate taxpayers in response to the findings and recommendations of the Willis Committee.[2] The purpose of the COMPACT is to seek solutions to issues inherent in "Our Federalism." Federalism recognizes a separate and independent State taxing authority affecting multijurisdictional commerce as a legitimate source of revenue for the States.

Twenty States have adopted the MULTISTATE TAX COMPACT through State legislation. sixteen additional States have ratified the goals of the Commission by joining as associate member States.[3]

The Commission is appearing in this case to defend the qualified sovereignty of the States to impose sales and use taxes with respect to interstate commerce, which the Court has indicated should pay its just share of the cost of State government. A defense appears necessary,

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[1] This brief is filed pursuant to the consent of the parties.

[2] *See* Corrigan, A Final Review, 1989 Multistate Tax Comm'n Rev. 1, 1 and 23. The Willis Committee, a congressional study of State taxation of interstate commerce sanctioned by TITLE II of PUB. L. NO. 86-272, 73 STAT. 555, 556 (1959), made extensive recommendations as to how Congress could regulate State taxation of interstate commerce.

[3] The current full members are the States of Alabama, Alaska, Arkansas, California, Colorado, District of Columbia, Hawaii, Idaho, Kansas, Minnesota, Missouri, Michigan, Montana, New Mexico, North Dakota, Oregon, South Dakota, Texas, Utah, and Washington. The associate members are the States of Arizona, Connecticut, Georgia, Illinois, Louisiana, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, North Carolina, Ohio, Pennsylvania, Tennessee, West Virginia, and Wisconsin.

because rapid economic change in the Nation and the world have the potential to influence the operation of State tax systems and raise issues about their compliance with the U.S. Constitution. The Commission seeks to defend existing State tax systems when allegations of discrimination under the Commerce Clause arise from changed economic conditions, rather than any discriminatory intent, and those allegations are not supported by the existing jurisprudence of the Court.

The Commission also seeks a decisional framework from this case that will allow the States and private parties to determine reliably whether changed economic conditions have transformed a lawful taxing system into one that is unlawful. A clear decisional framework will promote the avoidance of disruptive declarations of unconstitutionality that provide windfalls to some taxpayers and undermine the legitimate reliance interests of private parties and of the States in an established source of revenue. Such a framework will allow the States to better understand what they must know to monitor changing economic conditions, for States do not necessarily have ready access to inside information of affected industries. A clear framework that frees States from having to defend tax statutes that are facially neutral and that were not motivated by discriminatory intent would protect this Court from having to sit as a review board to monitor, on a case by case basis, the changing legal status under the Commerce Clause of State taxing statutes in the face of the bountiful economic changes that are the hallmark of a market economy.

SUMMARY OF ARGUMENT

Ohio, like many States, exempts the sale of natural gas from its general sales and use tax if the sale is made by a natural gas public utility. A separate gross receipts

tax, generally more onerous, applies to sales by utilities. At one time, nearly all sales of gas to consumers were made by utilities and thus were exempt from the sales and use tax. After the Federal Government deregulated the gas industry, other options for purchasing natural gas became available, at least to those with leverage in the market place. Large users could bypass utilities and bargain directly with producers, marketers, and brokers (merchants). General Motors, typical of many large users, is able to save money by purchasing natural gas for use in Ohio from merchants rather than from utilities.

Petitioner General Motors challenges the Ohio general sales and use tax exemption for natural gas purchased from utilities, alleging that the Ohio statute discriminates against interstate commerce. Petitioner makes this claim notwithstanding that the Ohio statute treats interstate transactions neutrally on its face, was not adopted with a discriminatory intent, and cannot fairly be said to have a discriminatory impact from the evidence presented. The challenged tax system does not distinguish between: (1) gas produced out-of-state and gas produced in-state; (2) gas bought from out-of-state producers and gas bought from in-state producers; (3) gas bought from out-of-state merchants and gas bought from in-state merchants; or, (4) gas, the title to which passes in Ohio and gas, the title to which passes outside of Ohio. Nothing in the Ohio statute supports the allegation of facial discrimination.

The record below contains no evidence that the Ohio exemption for sales by utilities has a discriminatory effect on interstate commerce. Petitioner bears the burden of proving discrimination in fact, so its claim of discriminatory impact should fail for lack of proof. Nor can Petitioner fairly claim that Ohio had an intent or purpose to discriminate against interstate commerce in enacting its exemption for sales by utilities. The exemption was

adopted decades ago, at a time when virtually all natural gas sales were made through utilities.

General Motors seeks to live in a world free of sales and use taxes with respect to its purchases of natural gas. General Motors apparently has not paid any sales or use taxes to other States on those purchases. If General Motors were freed of the Ohio sales and use tax by this Court, it would have managed to turn the Commerce Clause upside down, to have used it as a shield, not from discriminatory taxation, but from *all* sales and use taxation. This Court, in its recent sales and use tax cases, has shown great sensitivity to the risk of immunizing interstate commerce from paying its fair share of taxation. It should not radically extend the concept of a discriminatory tax so as to depart from the free market rationale that underpins its recent Commerce Clause jurisprudence.

ARGUMENT

General Motors is challenging the constitutionality of the Ohio general sales and use tax. Ohio taxes the sale in Ohio of many types of tangible personal property,[4] including natural gas. Like other States, Ohio also imposes a compensating use tax on the storage, use, or consumption of tangible personal property brought into Ohio.[5] The Ohio sales and use tax contains many exemptions, one of which applies to sales of natural gas by a "natural gas company" that delivers the gas through its own pipelines.[6] A "natural gas company" is defined by statute as a

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[4] Ohio Rev. Code Ann. § 5739.02. ("* * * [A]n excise tax is hereby levied on each retail sale made in this state.")

[5] Ohio Rev. Code Ann. § 5741.02.

[6] Ohio Rev. Code Ann. § 5739.02(B)(7) ("(B) The tax does not apply to the following: * * * (7) Sales of natural gas by a natural gas company, of electricity by an electric company, of water by a waterworks company, or of steam by a heating company, if in each

"public utility" engaged in the delivery of natural gas (utility).[7] Such utilities are subject to extensive regulation by Ohio.[8] They are also subject to a gross receipts tax,[9] the burden of which generally would equal or exceed the burden imposed by the sales and use tax.[10]

Taking advantage of the Federal deregulation of the market for natural gas, General Motors purchased natural gas from producers, marketers, or brokers (merchants) outside Ohio. It paid a use tax to Ohio on its purchase price when the gas was brought into Ohio.[11] By necessity, the gas was delivered to General Motors through interstate pipelines and then through pipelines owned and

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case the thing sold is delivered to consumers through wires, pipes, or conduits . . . ."). The Ohio Supreme Court, in the proceedings below, interpreted this statutory language to mean that a utility must deliver natural gas through its own pipelines to qualify for the exemption from the sales and use tax.

[7] Ohio Rev. Code Ann. § 5727.01.

[8] See Ohio Rev. Code Ann. Ch. 4905 and 4909.

[9] Ohio Rev. Code Ann. § 5727.38. In addition to the general gross receipts taxes, Ohio imposes certain additional gross receipts taxes, the rates of which vary from year to year. Ohio Revised Code Ann. §§ 4905.10 and 4911.18. These taxes are hereinafter referred to collectively as the gross receipts tax.

[10] Like all State sales taxes, the Ohio sales tax is imposed on a tax base that excludes the tax itself (tax-exclusive base); in contrast, the gross receipts tax, like income taxes, is imposed on a tax base that includes the tax (tax-inclusive base). The sales tax rate, tax exclusive, is 5%. The tax-inclusive rate would be 4.75% (.05) x (1 - .05)). The tax-exclusive rate for the gross receipts tax for 1995 is 5.16% and the tax-inclusive rate is 4.91% (general statutory rate of 4.75% plus additional gross receipts taxes totaling 0.16%). Rates for the years at issue in the case are comparable. For detailed calculations, see *Amicus* Brief of Columbia Gas of Ohio, Inc. on Behalf of Respondent at 18-23.

[11] General Motors could offset against its use tax any sales tax it paid to other States on the purchase of its gas. Ohio Rev. Code Ann. § 5741.02(C)(5).

operated by Ohio utilities.[12] If General Motors had purchased the natural gas from a utility, the sale would have been exempt from the sales and use tax.[13] According to General Motors, this statutory system of taxing sales from merchants and exempting sales from utilities discriminates against interstate commerce and thus violates the Commerce Clause.

I. The Ohio Statute Does Not Violate the Commerce Clause

A. Overview

Neither the Court nor commentators have clearly marked the contours of the Commerce Clause discrimination doctrine. Tax statutes challenged as discriminating against interstate commerce can be divided, nevertheless, into two categories: those that are discriminatory on their face and those that are neutral on their face. In general, the Court has upheld State tax statutes that are facially neutral, absent strong reasons to believe that the tax has a discriminatory effect on interstate commerce.

A statute is facially discriminatory if the statutory system as a whole, fairly interpreted, treats out-of-state activities, goods, persons, or transactions less favorably than equivalent in-state activities, goods, persons, or transactions. A facially discriminatory statute will tax "a transaction or incident more heavily when it crosses State lines than when it occurs entirely within the State,"[14] will differentiate "between transactions on the basis of some

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[12] See Petitioner's Brief at 25.

[13] Ohio Rev. Code Ann. § 5739.02(B)(7).

[14] Chemical Waste Management, Inc. v. Hunt, 504 U.S. 334, 342 (1992), quoting Armco, Inc. v. Hardesty, 467 U.S. 638, 642 (1984).

interstate element,"[15] or will provide "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter."[16] The burden of making a facial challenge to a statute is heavy, for the Petitioner must establish that the statute could not be constitutional under any existing circumstances.[17] A facially neutral statute does not contain any of the above distinctions.

To determine whether a neutral tax statute has a discriminatory impact on interstate commerce, a court generally would be required to look beyond the statute and engage in fact finding, often extensive. It typically would need to determine the relative burdens imposed by the statute on persons engaged in interstate activities and similarly situated persons engaged in intrastate activities. Such an analysis of the incidence of a tax can be extremely complicated, in substantial part because the person upon whom a statute imposes tax liability may not be the person that actually bears the economic burden of the tax. As this Court has recently emphasized, "'the ultimate distribution of the burden of taxes [may] be quite different from the distribution of statutory liability.'"[18]

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[15] Fulton Corp. v. Faulkner, 116 S.Ct. 848, 854 (1996), quoting Boston Stock Exchange v. State Tax Comm'n, 429 U.S. 318, 332, n.12 (1977).

[16] Oregon Waste Systems, Inc. v. Dept. of Environmental Quality, 511 U.S. 93, 114 S. Ct. 1345, 1350 (1994).

[17] United States v. Salerno, 481 U.S. 739, 745 (1987) (non-tax case).

[18] Fulton v. Faulkner, supra note 15, at 858, citing McLure, Incidence Analysis and the Supreme Court: An Examination of Four Cases from the 1980 Term, 1 Sup. Ct. Econ. Rev. 69, 72 (1982).

The economic incidence of a tax is not possible to determine with accuracy in many cases.[19]

> The actual incidence of a tax may depend on elasticities of supply and demand, the ability of producers and consumers to substitute one product for another, the structure of the relevant market, the time frame over which the tax is imposed and evaluated, and so on.[20]

Whatever economic assumptions, theories, or models are used in the analysis would undoubtedly be open to challenge. Controversy would surround what factors should enter the analysis and what weight they should be given.

Courts have wisely sought to avoid a detailed inquiry into the economic effects of a statute in applying Commerce Clause limitations on State taxing power.

> [C]ourts as institutions are poorly equipped to evaluate with precision the relative burdens of various methods of taxation.[21]

They have avoided this inquiry with a strong de facto assumption that a facially neutral tax statute is constitutional. That presumption is not rebutted even if a State legislature apparently intended for the burden of the facially neutral tax to be borne by interstate commerce.[22]

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[19] Id. at 859.

[20] Id.

[21] Id., quoting Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 589-590 (1983).

[22] For example, this Court has upheld a significant State severance tax on coal, notwithstanding that 90 percent of the coal was shipped to other States under contracts that apparently required the tax to be paid by consumers in these other States. Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981). Whether the out-of-state consumers would actually bear the economic incidence of the tax "would require complex factual

The Court has recognized that making "disproportionate impact" the basic test of unconstitutionality under the Commerce Clause "would require a significant and, in [its] view, unwarranted departure from the rationale of [its] prior discrimination cases."[23]

Indeed, a disproportionate impact test would invite nearly endless litigation about the constitutionality of many common features of State taxes. Would a sales tax on hotel rooms be unconstitutional because most of the patrons are from out-of-state? Would a sales tax on rental cars be suspect for similar reasons? Would Nevada's taxes on gambling be unconstitutional because their economic incidence is borne primarily by out-of-state gamblers? In addition, because the underlying facts might change from year-to-year, specific determinations about the constitutionality of a State tax might have only limited value as precedent. For example, a State tax on hotels that was upheld in one year might be again subject to challenge if the State began attracting more tourists.

Notwithstanding the reluctance to do so, a court will strike down a facially neutral tax as discriminatory if it can fairly conclude, without extensive fact finding, that the statute, although drafted in ostensibly neutral terms, is discriminatory in intent or effect. For example, the

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inquiries about such issues as elasticity of demand for the product and alternative sources of supply." Id. at 619 n. 8.

[23] Id. at 619. See also Moorman Mfg. Co. v. Bair, 437 U.S. 267 (1978), upholding a single-factor apportionment formula, neutral on its face, over Justice Powell's assertion that Iowa was favoring its manufacturers over out-of-state manufacturers. Id. at 283-84 (Powell, J., dissenting). In a non-tax case, the Court echoed the same sentiments quoted in the text: "The fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce." Exxon Corp. v. Gov. of Maryland, 437 U.S. 117, 126 (1978).

Court has been willing to look behind facially neutral statutes in situations where a tax or license fee fell upon itinerant salespersons or drummers.[24] Nevertheless, the Court's recent cases striking down statutes because they discriminated against interstate commerce involved statutes that could fairly be described as facially discriminatory rather than as neutral on their face.[25] In most of those cases, the legislatures that enacted the offending statutes could fairly be said to have had a discriminatory intent.

Complementing the strong de facto assumption that facially neutral tax statutes are constitutional, there is a strong de jure presumption against the constitutionality

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[24] See e.g., Nippert v. City of Richmond, 327 U.S. 416 (1946).

[25] See, e.g., Boston Stock Exchange v. State Tax Comm'n, supra note 15 (statute discriminated against out-of-state sales); Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984) (statute exempted products manufactured in the State); New Energy Co. of Indiana v. Limbach, 486 U.S. 269 (1988) (statute favored ethanol produced in the State); Westinghouse Electric Corp. v. Tully, 466 U.S. 388 (1984) (statute favored exports made from the State); Oregon Waste Systems, Inc. v. Dept. of Environmental Quality, supra note 16 (1994) (statute discriminated against out-of-state garbage); Associated Industries of Missouri v. Lohman, 114 S. Ct. 1815 (1994) (statute imposed higher tax on out-of-state goods); Maryland v. Louisiana, 451 U.S. 725 (1981) (statute, *inter alia*, imposed heavier tax on gas sold to other States); Kraft General Foods, Inc. v. Iowa Dept. of Revenue and Finance, 505 U.S. 71 (1992) (statute exempted dividends received from U.S. corporations); Armco v. Hardesty, supra note 14 (statute discriminated against out-of-state manufacturing); Tyler Pipe v. Washington, 483 U.S. 232 (1987) (statute discriminated against out-of-state sales); West Lynn Creamery v. Healy, 114 S. Ct. 2205 (1994) (statutory system discriminated against out-of-state milk); Fulton Corp. v. Faulkner, supra note 15 (statutory system favored domestic corporations); Chemical Waste Management, Inc. v. Hunt, supra note 14 (statute imposed higher charge on out-of-state garbage).

of facially discriminatory statutes. Of course the Court has not held that a State statute that is facially discriminatory is necessarily unconstitutional.

B. The Ohio Taxing System Does Not Discriminate on Its Face Against Interstate Commerce

In its brief, Petitioner asserts that the Ohio taxing system, with its exemption for natural gas purchased from utilities, discriminates against interstate commerce. Petitioner does not state whether it is alleging facial discrimination or discrimination in fact.[26] Indeed, it provides little by way of argument or citation to the Ohio tax statute in support of its assertion of discrimination. Pages 11-25 of Petitioner's brief address the issue of Commerce Clause discrimination. Nearly all that discussion (Pages 12-25), as the section headings of the brief indicate,[27] deal with possible issues that would be relevant to this case only upon a finding that the Petitioner has made out its case that the Ohio taxing system is discriminatory.

Petitioner's affirmative argument that the Ohio statute is discriminatory on its face is set forth on p. 11-12 of its brief. Petitioner presents its argument by stringing to-

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[26] At one point in its brief, Petitioner states explicitly rather than by inference that the Ohio "taxing statute facially discriminates against interstate commerce. . . ." Petitioner's Brief, at 17. See note 37 infra and accompanying text.

[27] Section A on p. 12 is entitled, The *Discriminatory Tax* Cannot Be Saved Because It Also Discriminates Against Some In-State Commerce (emphasis added). Section B on p. 17 is entitled, The *Discrimination* Cannot Be Justified On The Theory That The Use Tax On Out-Of-State Purchases "Compensates" For The Gross Receipts Tax On Local Public Utilities (emphasis added). Section C on p. 18 is entitled, The *Discrimination* Cannot Be Justified On The Theory That Ohio Has An Interest In Favoring Local Public Utilities (emphasis added).

gether snippets of Commerce Clause rhetoric that have nothing to do with the facts of this case. Petitioner states:

> This Court has long recognized that the Constitution "was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 523 (1935) (footnote omitted). "The few simple words of the Commerce Clause" were the Framers' principal mechanism for ensuring that "the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation" would not be repeated under our current Constitution. Hughes v. Oklahoma, 441 U.S. 322, 325-26 (1979). Here, however, the Ohio taxing system implements precisely the "economic Balkanization" which this Court has long held unconstitutional—Ohio taxes out-of-state natural gas, but exempts gas purchased from its own public utilities. This system of taxation creates a preference for gas sold by an Ohio public utility—and, correspondingly, it creates a disincentive to purchase gas from any other source, including *all* out-of-state sources.[28]

This characterization of the Ohio statute is mistaken. Petitioner would have this Court believe that Ohio facially discriminates by taxing "out-of-state natural gas"—presumably gas purchased or produced out-of-state—and exempting gas purchased from "its own" public utilities. Citations to the Ohio statute are not provided to support this position, nor could they be, for the statute does not so provide.

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[28] Petitioner's Brief at 11-12 (emphasis in original).

The statute unquestionably provides that natural gas sold by merchants is taxable whether or not the gas was produced within or without Ohio or purchased within or without Ohio.[29] In addition, the exemption for sales by natural gas utilities unquestionably is available whether the gas sold is produced within or without Ohio or is purchased within or without Ohio.[30] No special burden is placed on the sale of natural gas because of the interstate characteristics of its sale or its production.

Petitioner attempts to taint the Ohio sales tax by asserting, imprecisely and inaccurately, that it "creates a preference for gas sold by an Ohio public utility—and, correspondingly, it creates a disincentive to purchase gas from any other source, including *all* out-of-state sources."[31] Petitioner does not explain what it means by "source." If source is meant to refer to place of production, then Petitioner is clearly wrong.[32] If "source" is meant to refer to the State of purchase, Petitioner is again clearly wrong. Natural gas purchased from merchants in Ohio is taxed in exactly the same way as natural gas purchased from merchants outside of Ohio.

What may not be entirely clear from the statute is the treatment of natural gas purchased from out-of-state utilities for use in Ohio. There is no Ohio case law directly on point. The Ohio statute, however, provides an exemption from the use tax if the acquisition would, "if made in Ohio, . . . be a sale not subject to the [sales] tax . . . ."[33] This language could be interpreted by the Ohio courts to mean that an acquisition from a non-Ohio utility would

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[29] See Ohio Rev. Code Ann. §§ 5739.02 and 5741.02.

[30] Ohio Rev. Code Ann. § 5739.02(B)(7).

[31] Petitioner's Brief at 12 (emphasis in original).

[32] Ohio Rev. Code Ann. § 5739.02(B)(7).

[33] Ohio Rev. Code Ann § 5741.02(C)(2).

be exempt if made under the same conditions that are required for the exemption to apply to acquisitions made from Ohio utilities.

Under accepted canons of interpretation, this Court should presume that the Ohio courts would construe the Ohio statute so as to preserve its constitutionality. To act otherwise would put many innocent exemptions at risk. For example, assume that a State provides an exemption from its sales tax for sales of books made by museum stores that are operated as charitable organizations. The typical use tax statute might be interpreted to grant a comparable exemption for books purchased from an out-of-state museum and brought into the State. The sales tax exemption for museum sales should not be jeopardized simply because the State courts have not specifically ruled on the availability of the exemption.

In an apparent attempt to make out a case of facial discrimination, Petitioner characterizes the Ohio statutory system as discriminating against goods delivered into the State by "common carriage" rather than by the seller's own local distribution network.[34] Based on its characterization of the Ohio tax system, Petitioner goes on to argue that if the Court were to uphold that system, it also would have to uphold a State statute that exempted local newspapers that utilized their own delivery services while taxing out-of-state newspapers that contracted with third parties for delivery services. "The result would plainly be favoritism of the local newspa-

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[34] Petitioner's Brief at 21-22. Petitioner's dichotomy between goods delivered by common carrier and goods delivered by a local distribution network is false because the only way natural gas can be delivered to Ohio customers is through the pipelines owned and operated by the local utility serving those customers.

per."[35] A holding for Respondent, however, would not have that implication.

A fundamental fallacy in Petitioner's argument by analogy is that nothing in the definition of a newspaper is dependent on the manner in which newspapers are delivered to customers. In contrast, the essential characteristic of an Ohio natural gas utility is that it operates pipelines that deliver natural gas to its Ohio customers. That characteristic is a necessary part of the definition of a natural gas utility, not a characteristic that distinguishes some natural gas utilities from other natural gas utilities. Thus, a natural gas utility engaging in sales of natural gas not delivered by the utility's own pipeline would not meet the definition of a natural gas utility and would be treated as a merchant making taxable sales.

The hypothetical statute suggested by Petitioner that would limit a sales tax exemption to newspapers utilizing their own delivery services would not be using the limitation to define a newspaper. Instead, it would be imposing a separate and independent condition on the availability of the exemption. That is, a newspaper company remains a newspaper company whether it delivers its newspapers to customers through its own distribution network or uses third parties to make the deliveries.

For the Petitioner's argument by analogy to have applicability to this case, Petitioner must assert that a State cannot exempt certain sales from the sales tax if the definition of those sales has an inherent geographical limitation. For example, suppose that a State wishes to exempt newspapers sold through "vending machines" from its sales tax. To implement that exemption, it defines a "newspaper vending machine" as a coin-operated

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[35] Petitioner's Brief at 24. Petitioner provides other variations on this same theme. See id. at 23-24.

device that delivers the newspaper to the consumer at the place of purchase. Such vending machines are a common fixture in many urban areas.

Assume that all existing newspaper vending machines in the State are owned by local newspaper companies, that some local newspapers do not have any vending machines, and that the existing technology allows for the distribution of only one type of newspaper per machine. Assume also that the State's intent was not discriminatory but instead was motivated by administrative concerns about collecting the proper amount of tax or by a desire to encourage easy access by out-of-town workers and individuals unable to get home delivery.

Under the Petitioner's argument by analogy, the exemption should be unconstitutional as facially discriminatory because it applies only to newspapers utilizing their own local delivery services, notwithstanding that in-state newspapers not sold through vending machines would be taxable the same as out-of-state newspapers. Petitioner's implicit argument has no merit. No one could seriously contend that the definition of "vending machine" in the tax statute resulted in facial discrimination against interstate commerce. Nor is the statute tainted by any protectionist goals of the legislature.[36] In such circumstances, the exemption for newspapers sold through vending machines would pass constitutional muster as a facially neutral statute under existing Commerce Clause precedents.

Petitoner's attempt to prove that the Ohio tax statute facially discriminates against interstate commerce is verbal strong arming. Petitioner asserts that "[w]here, as

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[36] If Ohio had such an exemption, newspapers purchased from out-of-state vending machines and brought into the State presumably would be exempt from the use tax under Ohio Code Rev. Ann. § 5741.02(C)(2).

here, a taxing statute facially discriminates against interstate commerce. . . ."[37] As discussed above, however, it offers no statutory citations or analysis to support that bare assertion. The reason is simple—the statutory system, viewed as a collection of parts and as a totality, is facially neutral. It does not distinguish between: (1) natural gas produced out-of-state and gas produced in-state; (2) gas bought from out-of-state producers and gas bought from in-state producers; (3) gas bought from out-of-state merchants and gas bought from in-state merchants; or (4) gas the title to which passed in Ohio and gas, the title to which passed outside of Ohio. In short, the exemption and the tax do not rely on any criteria that support a characterization of facial discrimination.

C. Petitioner Has Not Established that the Ohio Legislature Harbored a Discriminatory Intent

Much of Commerce Clause jurisprudence on discrimination has been concerned with the prevention of economic protectionism by the States. Facially discriminatory statutes typically reflect protectionist goals.[38] Cases involving facially neutral statutes in which the Court was willing to look behind the statute involved taxes, levies, or fees that could be characterized as ones in which the State intended to disadvantage out-of-state competitors, activities, or products. The various cases cited by Petitioner to support its Commerce Clause claim also have been described by this Court in protectionist terms.

The Ohio exemption for natural gas sold by utilities cannot be similarly described. The exemption was a

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[37] Petitioner's Brief, at 17. The statement is made in Section B where the Petitioner is addressing Ohio's defenses to what is already assumed to be a facially discriminatory statute.

[38] See supra note 25 and accompanying text.

feature of the first Ohio sales and use tax, enacted in 1934.[39] At that time, the gas industry had not yet been deregulated, and in-state and out-of-state merchants were unable to sell natural gas to Ohio customers because they lacked the means of delivery. The Ohio legislature could not have had protectionist motives when no reasonable possibility of competition existed.

No legislative history exists regarding the Ohio exemption for utilities. Such exemptions are common among the States, however, and probably can be explained by three factors. First, utilities are typically subject to gross receipts taxes, as they are in Ohio.[40] Those taxes, like sales taxes, typically get passed through to consumers. They have the political charm, however, of being invisible to those consumers. Because consumers typically were already paying the gross receipts tax, which was buried in the price paid for their utilities, legislators may not have wanted to impose a second excise tax—especially one that would be separately stated and would be visible to the customer.

Second, sales taxes often contain exemptions for what are perceived to be necessities, such as food and utilities. Although some States limit their exemption to sales of natural gas made to residential users, Ohio's exemption is broader and extends to all sales of natural gas by utilities to their customers. The Ohio legislature might not have wanted to distinguish between gas used for heating homes and gas used for heating offices and factories. Perhaps, in the midst of the Great Depression, the legislature did not want to levy a sales tax in addition to the gross receipts tax on utilities for fear of increasing the

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[39] 115 Ohio Laws Tt. II 306, 307-8 (1934).

[40] 111 Ohio Laws 399, 412-3 (1910).

cost of a business input for commercial and industrial users.

Third, imposing a sales tax on sales by a utility of natural gas presents some technical difficulties because the utilities charge their customers a bundled price for natural gas that reflects not only the charge for the gas but also the charge for its delivery. Unbundling such prices is important because the delivery services are not taxable under Ohio law. The unbundling is a fairly complex matter, however, in part because the utilities are required under Ohio law to charge customers a uniform price for a unit of natural gas, whereas the costs for delivering a unit of natural gas are unlikely to be uniform for all customers.

D. Petitioner Has Not Established that the Ohio Taxing System Has a Discriminatory Impact

Petitioner invites the Court to look behind the Ohio tax statute and hold that the taxing system has a discriminatory impact on interstate commerce. In the past, the Court has found similar invitations to be unappealing, recognizing the "general difficulty of comparing the economic incidence of State taxes paid by different taxpayers upon different transactions."[41] Undertaking an economic analysis here is both unappealing and essentially impossible, because the Petitioner did not introduce any evidence as to the practical effects of the exemption. Instead, Petitioner simply asserts, speculates, raises theoretical possibilities, and crafts hypotheticals about the impact of the Ohio system on interstate commerce. In the absence of strong empirical evidence of discrimination in fact, the

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[41] Fulton, supra note 15, at 859.

Petitioner's discretionary-impact argument should fail for lack of proof.[42]

From the facts in the record, discrimination in fact against interstate commerce appears exceedingly unlikely, for at least two reasons. First, the exemption complained of by Petitioner applies to sales by regulated utilities and not to sales by merchants. For this differential treatment to raise the specter of constitutionally suspect discrimination, Petitioner must establish at a minimum that merchants and utilities are sufficiently similar in their businesses that a failure by Ohio to provide them with functionally equivalent treatment raises an issue of discrimination under the Commerce Clause.[43] It is clear from the record, however, that merchants and utilities operate under significantly different legal and economic conditions.[44]

Second, Petitioner must provide proof that the Ohio tax system as a whole imposes significantly heavier taxes on interstate commerce than on intrastate commerce,

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[42] "The burden to show discrimination rests on the party challenging the validity of the statute . . . ." Hughes v. Oklahoma, 441 U.S. 322, 336 (1979). Compare Moorman Mfg. Co. v. Bair, supra note 23 (Commerce Clause claim denied for failure to prove multiple taxation in matter involving a facially neutral statute) with Armco, Inc. v. Hardesty, supra note 14 (Commerce Clause claim upheld without necessity of proving multiple taxation in matter involving a facially discriminatory statute).

[43] See, e.g., Amerada Hess Corp. v. Director, Div. of Taxation, 490 U.S. 66 (1989) (allowing differential tax treatment of oil producers and retailers, both engaged in the sale of oil); Alaska v. Arctic Maid, 366 U.S. 199 (1961) (allowing differential treatment of fish processed by freezer ships and fish processed by local canneries); Dumbar-Stanley Studios v. Alabama, 393 U.S. 537 (1969) (allowing differential tax treatment of traveling photographers and photographers operating out of fixed locations).

[44] For an extended discussion of those differences, see infra at pages 27-28.

notwithstanding the fact that Ohio utilities pay a substantial gross receipts tax with respect to their sales of gas.[45] That tax is likely to exceed the sales tax paid with respect to sales by merchants in most cases.[46] Of course Petitioner has introduced no evidence about the overall impact of Ohio taxes on interstate commerce.[47]

Even if the Petitioner had provided proof below that the Ohio tax system, in its totality, adversely affected interstate commerce, it still would have failed to demonstrate that Ohio has violated the Commerce Clause. Because the Ohio system is facially neutral and was not adopted with a discriminatory intent, the burden on the Petitioner to prove a Commerce Clause violation is, and should be, very high.

It is not enough to make out a case of in-fact discriminatory impact to show that the burden of a questioned tax is borne primarily by interstate commerce when the taxing system is facially neutral and was not adopted with a discriminatory intent. In these circumstances,

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[45] See, e.g., Halliburton Oil Well Cementing Co. v. Reily, 373 U.S. 64, 69 (1962).

[46] See note 10, supra. See also *Amicus* Brief filed by Columbia Gas of Ohio, Inc. on Behalf of Respondent, at 18-23.

[47] The point is not that the gross receipts tax on utilities may constitute a compensatory tax, as described in Fulton Corp. v. Faulkner, supra note 15 at 854-5. Whether a tax is compensatory is a relevant issue only if some other tax has been shown to be discriminatory on its face. In making its argument that the Ohio sales and use tax is discriminatory in fact, Petitioner is assuming, for purposes of that argument only, that the tax is not facially discriminatory. Accordingly, the compensatory-tax doctrine is not relevant here. In determining whether the Ohio sales and use tax is discriminatory in fact, Petitioner must show that the entire Ohio tax system, including the gross receipts tax and any other special taxes on utilities, results in a substantial discriminatory burden on interstate commerce.

Petitioner should be required to show that the Ohio taxing system presents a palpable and serious threat to the primary values that underlie the Court's Dormant Commerce Clause jurisprudence. Any less stringent requirement would impose unreasonable burdens on the States. A lower requirement might force the States to modify their tax systems or engage in costly litigation whenever a taxpayer is able to introduce evidence that changing economic conditions have caused a taxing system of long standing to affect interstate commerce in some new and unanticipated way.

II. Authorities Cited by Petitioner Do Not Support Its Position

The cases Petitioner relies on to support its argument that the Ohio statute discriminates against interstate commerce actually undercut that argument and serve to underscore its lack of support in the case law. For example, Petitioner cites *Halliburton Oil Well Cementing Co. v. Reily*[48] for the proposition "that when a State provides an exemption from sales tax, it must provide a strictly equal exemption from use tax for the same goods when purchased outside the State."[49] Petitioner apparently reads *Halliburton* to mean that any time a State grants an exemption for the sale of a product under specific conditions, it must extend that same exemption to the purchase of that product even if that purchase occurs under completely different circumstances. Petitioner argues:

> [T]he decision of the Ohio Supreme Court sanctioned the exemption from sales tax of in-state

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[48] Supra note 45.

[49] Petitioner's Brief at 12. Actually, the facts in Halliburton involve the manufacture and not the purchase of a good outside the taxing State.

> purchases of natural gas from local public utilities while out-of-state purchases were subjected to a use tax. This favoritism violates the Commerce Clause.[50]

But *Halliburton* never held what Petitioner would read into it. *Halliburton* involved the use taxation of specialized oil equipment that the taxpayer manufactured outside of Louisiana. When this equipment was brought into Louisiana, the State levied a use tax on the cost of the equipment. The statutory measure of cost included the value of labor and overhead that entered into the manufacturing of the machinery. Labor and overhead would have been excluded from the sales tax base if the same machinery had been manufactured in Louisiana. Consequently, the Louisiana sales and use tax facially discriminated against machinery manufactured outside the State and, if left intact, would have encouraged some taxpayers to manufacture in Louisiana, leading to the "economic Balkanization" that the Court has associated with unconstitutional discrimination.

In sharp contrast to Louisiana's tax system that was rejected in *Halliburton*, Ohio's sales and use tax is geographically neutral. All gas purchased from utilities is exempt, regardless of where produced, and all gas purchased from other sources is taxable, regardless of where produced. Under Petitioner's reading of *Halliburton*, if Ohio were to exempt from its sales tax books purchased at a museum bookstore, it could not levy its sales or use tax on books bought from other vendors, including books bought from out-of-state. Nowhere does *Halliburton* set forth or imply such an untenable view.

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[50] Petitioner's Brief at 12.

The Petitioner's reliance on *Bacchus Imports, Ltd. v. Dias*[51] further illustrates the weakness in its discrimination argument. *Bacchus* struck down Hawaii's exemption from its liquor excise tax for locally produced brandy and wine. "[T]he effect of the exemption is clearly discriminatory, in that it applies only to locally produced beverages, even though it does not apply to all such products."[52] Petitioner states:, "The same is true of the Ohio exemption: it 'applies only to locally-[sold gas], even though it does not apply to all such products.'"[53]

Instead of supporting Petitioner, *Bacchus* spotlights a fundamental defect in Petitioner's discrimination argument. The fatal flaw in Hawaii's exemption was that it was limited to locally produced wine and brandy. But Ohio does not limit its exemption to locally produced gas; its exemption is geographically neutral.

Indeed, Petitioner attempts to disguise this important difference through a self-serving paraphrase of the language quoted above from *Bacchus*. In that case, the Court describes the Hawaii exemption as clearly discriminatory "in that it applies only to locally *produced* beverages. . . ."[54] When Petitioner paraphrased this language in the context of its case, it did not simply substitute "gas" for "beverage," which would have been straightforward. Instead, it substituted "locally *sold* gas" for "locally *produced* beverages."[55]

If the quotation from *Bacchus* were reproduced accurately with "gas" inserted for "beverage," it would read as follows: "the effect of the exemption is clearly dis-

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[51] Supra, note 25.

[52] Id. at 271, cited in Petitioner's Brief at 15.

[53] Id. (square brackets supplied by Petitioner).

[54] Id. at 271 (emphasis added).

[55] Petitioner's Brief at 15 (emphasis added).

criminatory, in that it applies only to locally produced gas, even though it does not apply to all such products." Stated accurately, *Bacchus* has no relevance to Ohio's exemption, which is neutral as to where gas is produced. The exemption applies regardless of where the gas was produced. Moreover, it was undisputed in *Bacchus* that "the purpose of the exemption was to aid Hawaii industry,"[56] whereas Ohio had no discriminatory intent in adopting its exemption.

Whereas a State tax exemption limited to goods produced within that State is invalid under *Bacchus*, an exemption limited to goods sold or used within a State is not constitutionally suspect. All sales tax exemptions apply to locally sold products, and all use tax exemptions apply to locally used products. Such a geographical condition is inherent in the structure of a sales and use tax.

Other cases Petitioner relies on are also irrelevant. For example, Petitioner cites *Boston Stock Exchange v. State Tax Comm'n* for the

> ironclad rule that "[n]o State, consistent with the Commerce Clause, may 'impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business.'"[57]

The New York statute at issue in *Boston Stock Exchange*, however, was facially discriminatory, imposing a higher tax on out-of-state sales of stock than on New York sales. The expressed intent of the New York legislature was to use the higher tax to divert business from out-of-state exchanges to the New York exchange. The taxpayer did not need to prove that the New York statute discriminated against interstate commerce. The Court

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[56] Supra note 25 at 271.

[57] Petitioner's Brief at 20.

held that "no State may discriminatorily tax the products manufactured or the business operations performed in any other State."[58]

The Ohio statute is consistent with the holding in *Boston Stock Exchange*. Ohio does not discriminate based on where the sale of natural gas takes place or where the gas is produced. And gas sold by an out-of-state utility is exempt to the same extent that a similar sale would have been exempt if made by an Ohio utility. Consequently, to paraphrase the holding in *Boston Stock Exchange*, supra, Ohio does not discriminatorily tax the products (gas) manufactured outside Ohio nor does it discriminatorily tax the business operations performed outside of Ohio.

In addition, unlike the situation in *Boston Stock Exchange*, Ohio's exemption was not motivated by protectionism. Furthermore, the Ohio statute is facially neutral and the Petitioner has not submitted any evidentiary proof of its claim of discrimination in fact.

III. A Decision for Petitioner Would Radically Extend Existing Commerce Clause Doctrine and Would Frustrate Essential State Tax and Regulatory Power

For reasons discussed above, a decision for Petitioner in this case would alter substantially the Court's current Commerce Clause doctrines. In effect, the Court is being asked to hold that a tax statute that is facially neutral, that has no discriminatory intent, and that cannot fairly be said to have a discriminatory impact from the evidence presented, nevertheless violates the Commerce Clause because it fails to treat natural gas public utilities under its taxing system the same as in-state and out-of-state natural gas merchants. In substance, Petitioner has made out the rudiments of an equal protection argument, which

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[58] Id. at 337.

this Court would not accept under current doctrine unless it concluded that Ohio has no rationale basis for distinguishing in its taxing system between regulated natural gas utilities, which are subject to a gross receipts tax and extensive State regulation, and natural gas merchants.

To convert its makeweight equal protection argument into a Commerce Clause argument, Petitioner and its *amici curiae* raise the specter of economic Balkanization if the Ohio taxing system is allowed to stand. The Chamber of Commerce *et al.*, as *amici curiae*, assert that such State taxing systems will tilt the allegedly level playing field in favor of local commerce. It goes on to assert:

> For a potential purchaser of natural gas faced with the question whether to purchase from an Ohio LDC, and thus free of sales and use tax, or, alternatively, to purchase the gas from an out-of-state seller, and pay a use tax on the gas, the choice is obvious. Assuming the price for the gas is the same, the purchaser will invariably choose to purchase from the local seller.[59]

Actually, the choice is between purchasing from either an in-state or out-of-state utility and being free of the sales and use tax or purchasing from an in-state or out-of-state merchant and being subject to the sales and use tax.

Of course when General Motors was faced with the choice of buying from a utility or buying from merchants, it chose to purchase its natural gas from merchants, strongly suggesting the falsity of the assumption that the pre-tax gas prices in the two markets are the same. Indeed, the Ohio system for regulating natural gas utilities almost guarantees that prices in the two markets will be

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[59] *Amicus* Brief of Chamber of Commerce of the United States *et al* at 10.

different. Nor is there anything that Ohio can do, short of deregulating natural gas utilities, to remove the price differences in those markets.

A gas utility has a natural monopoly for the delivery of gas to customers. It is the only economic player with pipelines connected to a particular set of customers, and no potential competitor could build its own competing pipelines without incurring ruinous costs and creating significant economic waste. Every State has responded rationally to this economic reality by giving legislative sanction to the natural monopolies of its utilities and then regulating those utilities to prevent them from exploiting their monopoly position to impose economic harm on the community of gas users. This regulatory system is not economic Balkanization. On the contrary, it is essential to prevent abuse of the free market.

Under its regulatory system, Ohio requires its utilities to sell natural gas at the same unit price to all its customers, without reference to the costs incurred in delivering natural gas to those customers. The U.S. Post Office follows a comparable policy in charging the same price for the delivery of first-class mail to rural and urban addresses, notwithstanding differences in delivery costs. Such uniform unit pricing systems have obvious social implications that many people believe are desirable. Those systems also offer some significant administrative advantages, due to the accounting difficulties that would arise in determining the unit costs of delivery and in collecting differential amounts from customers. The uniform pricing rule and various other special pricing rules skew the price of gas sold by utilities from the price that would be set by the market without State intervention.

Traditionally, the Court has used its Dormant Commerce Clause jurisprudence to prevent States from overreaching and saddling taxpayers engaged in interstate

commerce with discriminatory or excessive tax burdens. Threats to the free trade values of the Commerce Clause do not arise, however, only from excessive State taxation. They also are presented by the undertaxation of interstate commerce, as the Court has clearly acknowledged in some recent cases. In *Goldberg v. Sweet*,[60] for example, the Court upheld the constitutionality of a State excise tax on interstate telephone calls, thereby avoiding the immunization of interstate telephone services from any State sales taxation. Similarly, in *Jefferson Lines*,[61] the Court upheld the constitutionality of a sales tax on the sale of a ticket for interstate bus transportation, thereby avoiding a holding that would have had the practical effect of immunizing interstate bus trips form State sales taxation.

In this case, General Motors seeks the unfair advantage of operating in a tax-free world with respect to its purchases of natural gas.[62] Ohio is the logical State to impose sales and use taxes on natural gas used within its borders and has enacted legislation that does so.

In arguing for reversal of the decision below in favor of Respondent, Petitioner is arguing in effect to turn the clock back to an earlier era when the Court viewed interstate commerce as wholly immune form State taxation in any form. This quaint position slowly yielded over time to the modern view that interstate commerce may be made to pay its fair share of State expenses and "'to contribute

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[60] 488 U.S. 252 (1989).

[61] Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 115 S. Ct. 1331 (1995).

[62] It is safe to surmise General Motors did not pay a sales or use tax on the gas in issue. If it did, Ohio would have allowed a credit against the Ohio use tax, thereby eliminating most or all of the potential benefit to General Motors from bringing this suit. The record below indicates that General Motors did not claim a credit against the Ohio use tax for sales taxes paid to other States.

to the cost of providing *all* governmental services, including those services from which it arguably receives no direct benefit.'"[63] Whatever the meaning of the phrase "fair share," it does not mean an immunity from taxation.

Striking down the current Ohio taxing system would not strike a blow against economic Balkanization. On the contrary, it would undermine the ability of Ohio and the other several States to impose fair and reasonable sales and use taxes on natural gas used within their borders. Fair taxation of products moving in interstate commerce is an important prerequisite for the level playing field that Petitioner claims to support and that would be promoted by a decision for Respondent in this case.

CONCLUSION

For the reasons set forth above, the judgment of the Supreme Court of Ohio should be sustained.

Respectfully submitted,

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[63] Goldberg v. Sweet, supra note 60 at 267 (1989), quoting Commonwealth Edison Co. v. Montana, supra note 21 at 627 n. 16 (1981) (emphasis in original).

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No. 95-1232

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1995

GENERAL MOTORS CORPORATION,

Petitioner,

v.

ROGER W. TRACY, TAX COMMISSIONER OF OHIO,

Respondent.

On Writ of Certiorari to the Supreme Court of Ohio

BRIEF OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the Commerce Clause or the Equal Protection Clause requires States to tax purchases from natural gas utilities and natural gas marketers in the same manner, when State-regulated utilities have unique duties and obligations under law that set them apart from non-regulated businesses.

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No. 95-1232

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1995

GENERAL MOTORS CORPORATION,

Petitioner,

v.

ROGER W. TRACY, TAX COMMISSIONER OF OHIO,

Respondent.

On Writ of Certiorari to the Supreme Court of Ohio

BRIEF OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The National Association of Regulatory Utility Commissioners (NARUC) submits this brief as *amicus curiae* in support of Respondent due to the substantial harm reversal of the decision below could have upon the regulation of public utilities by its member State regulatory commissions. The NARUC files this brief with the written consents of the Petitioner General Motors Corp. (hereafter "General Motors") and the Respondent

Roger W. Tracy (hereafter "Ohio"), which have been filed separately with the Clerk.

The NARUC is a quasi-governmental nonprofit organization founded in 1889. The Association has no corporate parents or subsidiaries. Recognized by the Congress as "the national organization of the State commissions", 47 U.S.C. § 410(c) (1971), the NARUC presents the collective interest of State commissions charged with regulating the rates and conditions of service for the intrastate operations of electric, natural gas and telephone utilities. The NARUC's member commissions are obligated under State law to ensure that the rates charged to retail consumers are just and reasonable. The NARUC's mission is to serve the public interest by seeking to improve the quality and effectiveness of public utility regulation in America. Both Congress and the Federal courts have long recognized that the NARUC is a proper party to represent the collective interest of State regulatory commissions.[1]

In the decision herein under review, the Supreme Court of Ohio affirmed a ruling of the State's Board of Tax Appeals upholding the State's sales and use tax structure as applied to

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[1] *See, for example, United States of America v. Southern Motor Carrier Rate Conference, et al.*, 467 F.Supp. 471 (N.D. Ga. 1979), *aff.* 672 F.2d 469 (5th Cir. Unit "B" 1982); *aff. en banc*, 702 F.2d 532 (5th Cir. Unit "B" 1983, *rev'd*, 471 U.S. 48 (1985). *See also, Indianapolis Power and Light Co. v. Interstate Commerce Commission*, 587 F.2d 1098 (7th Cir. 1982); *Washington Utilities and Transportation Commission v. FCC*, 513 F.2d 1142 (9th Cir. 1976).

sales of natural gas to Ohio consumers.[2] A critical question at issue in this case is whether the special status placed upon public utilities by State law and regulation -- i.e. the duties and obligations that State-issued utility status confers -- can withstand analysis under the Commerce Clause. Here, the issue involves the State of Ohio's decision to tax utilities selling natural gas at retail differently than other gas sellers not subject to the burdens and benefits of public utility status. However, a decision by this Court reversing the decision below and finding Ohio's disparate tax treatment unconstitutional could call into question other factors which set utilities apart from non-regulated businesses, such as the grant of the power of eminent domain or the system of exclusive franchising which lie at the heart of utility regulation.

The NARUC does not seek to defend State actions which genuinely discriminate against interstate commerce, nor do we endorse any particular scheme for the taxation of the goods and services that utility companies provide. However, as the representative of the State agencies which confer and supervise the unique status of "public utility," the NARUC has a vital interest in participating in this case to provide background on State regulation of businesses "affected with the public interest"

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[2] The opinion of the Supreme Court of Ohio is reported at 652 N.E.2d 188 and appears at pages 1a-5a of the Petition for Certiorari. The unreported order of the Board of Tax Appeals appears at 6a-19a of the Petition.

and to address the broader context within which this tax dispute resides.

SUMMARY OF ARGUMENT

As Ohio describes in its brief on the merits, this case turns on the distinction between the commercial activities of two very different types of businesses: on the one hand, State-regulated public utilities (such as communications common carriage; generation, transmission and distribution of electricity; and as here, local distribution and retail sales of natural gas), and on the other, non-regulated businesses seeking to provide some, but not all, traditional "utility-type" services. The State of Ohio taxes these two types of businesses differently, not because they happen to be providing services in competition in a particular inter or intrastate market, but because of their distinctly different regulatory status under Ohio law. Because the differences in taxation under consideration in this litigation are but one element in the broader tableau of the rights and obligations of utilities under State law, the NARUC submits that the State of Ohio has a rational basis for distinguishing between local gas distribution and non-regulated businesses operating within and without the State. Accordingly, the decision of the Supreme Court of Ohio should be affirmed.

ARGUMENT

THE STATES HAVE TRADITIONALLY AND LEGITIMATELY DISTINGUISHED BETWEEN UTILITY AND NON-UTILITY BUSINESSES

As Justice Brandeis remarked in dissent in 1929 concerning the special status of a public utility established under Oklahoma law:

> a franchise to operate a public utility is not like the general right to engage in a lawful business, part of the liberty of the citizen; . . . it is of the essence of a special privilege that the franchise may be granted or withheld at the pleasure of the State; . . . it may be granted to corporations only, thus excluding individuals; . . . the Federal Constitution imposes no limits upon the State's discretion in this respect.
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> *Frost v. Corporation Commission*, 278 U.S. 515, 534 (1929)

While *Frost* involved the issue of competition in the market for the services of cotton gins, Justice Brandeis' observation that States can and do provide disparate treatment to the public utility franchises they create remains a fundamental premise of State regulation of energy and communications companies. Indeed, as first upheld in *Munn v. Illinois*, 94 U.S. 113 (1877), the ability of States to single out private businesses that they find to be "affected by the public interest" and constitutionally regulate their prices and conditions of service is

one of the three main legal doctrines underpinning modern economic regulation.[3]

There are important reasons why States provide different treatment to franchised utilities. Most fundamentally, utilities exercise substantial market power (if not always monopoly power) in the provision of retail services deemed essential to the public. As this court has acknowledged, "the regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States." *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission*, 461 U.S. 375, 377 (1983). Indeed, it has been a critically important (but often overlooked) development in the economic history of this century that each of the fifty States has chosen to exercise its inherent police powers to construct the legal status of "public utility" for very large private sector businesses operating pervasively within their respective borders.[4] These businesses, which provide much of the Nation's heat,

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[3] State economic regulation as now understood would not be viable without this court's rulings in two other lines of cases: the "State action" doctrine which allows States to require private businesses to implement policies that would violate Federal antitrust laws if implemented alone, *see Southern Motor Carriers Rate Conference v. United States*, 471 U.S. 48 (1985); and the "end result" doctrine which allows economic regulators to use a range of regulatory tools and methodologies in establishing utility rates provided that the end-result of the rate-setting process is within the range of reasonableness, *see FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944).

[4] *See*, NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, *Utility Regulatory Policy in the United States and Canada: Compilation 1994-1995* (1995) (hereafter NARUC COMPILATION) at 14-17.

light, communication and energy services, represent billions of dollars of capital invested by private shareholders in reliance on their status as State-defined utility companies. Until the very recent wave of privatization sweeping the globe, the United States had been virtually alone in its decisions, first, to permit (and indeed encourage) private-sector ownership of facilities providing such vital services, and second, to determine (and again encourage) that the regulation of the monopoly powers inhering in these businesses would be undertaken primarily through the police powers of the States recognized in *Arkansas Electric Cooperative, supra.*

As General Motors recounts in its brief on the merits, Federal and State policies governing the sale, transmission and distribution of natural gas have undergone substantial change in recent years, raising the question of whether the model of regulated utility monopoly can justify the distinction drawn by the court below.[5] In similar fashion, policies governing communications and electricity markets are also changing at both State and Federal levels - a process that this court has been quick

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[5] Pet Br. at 2-4, citing the Federal Energy Regulatory Commission's Order No. 436, Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, 50 Fed. Reg. 42,402 (1985); and Order No. 636, Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, 57 Fed. Reg. 13,267, 13,269 (1992).

to grasp.[6] However, while these developments share a common pro-competitive theme, they clearly do not constitute the implementation of a global policy of "deregulation" intended to sweep aside the concept of the utility enshrined in State and Federal law. As this case illustrates, Ohio (along with virtually every other State) retains the utility model for the distribution of natural gas, notwithstanding the Federal policy of well-head price deregulation or the availability of open-access transmission and distribution services. Similarly, despite provisions in the recent Telecommunications Act which open the local telephone exchange to competition, State regulation of communications providers as a public utility was not abolished, but reformed. Whatever the effect of injecting the forces of competition into some aspect of the natural gas business (e.g. marketing) there will remain core utility-type functions (e.g. local gas distribution) that retain the market power/public service attributes which provide the States grounds to impose special regulatory and tax policies.[7] A related reason why utilities are treated differently

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[6] *See, Duquesne Light Co. v. Barasch*, 488 U.S. 299, 316 n. 10 (1989) (anticipating "[t]he emergent market for wholesale electric energy.") *See also* FERC Order No. 888, Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, 61 Fed. Reg. 21,540 (1996), and the TELECOMMUNICATIONS ACT OF 1996, Pub.L. 104-104, 110 Stat. 56 (1996).

[7] For a general discussion of the obligations State economic regulation imposes on public utilities, *see* PHILLIPS, *The Regulation of Public Utilities* (1984) at 106-7.

is their ability to use public rights of way through the power of eminent domain granted by both State and Federal law.[8]

Utilities also receive special treatment under both State and Federal laws which require them to perform certain social welfare functions not imposed on non-regulated businesses. For example, under State law, natural gas utilities may be required to provide services to low-income, elderly and infirm customers during the winter whether or not customer bill payments are current.[9] Similarly, utilities may be required to fund energy conservation programs (which serve to reduce their sales volumes), provide funding for research and development, support programs to reduce environmental impacts beyond levels otherwise required of non-regulated entities, and face restrictions

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[8] Virtually every State grants utilities the right to condemn private property through either an administrative proceeding before a State regulatory commission or a judicial proceeding in State court. NARUC COMPILATION, *supra*, at 144. Section 7(h) of the Natural Gas Act, 15 U.S.C. § 717f(h) (1976) provides interstate pipelines with similar rights.

[9] *See* NARUC COMPILATION, *supra*, at 468-9 describing special rules for disconnection of natural gas and electric service during cold weather. In 1978, Congress enacted section 303 of the Public Utility Regulatory Policies Act (PURPA) requiring State regulatory commissions to conduct proceedings to consider implementing cold-weather policies such as these for their natural gas distribution companies. In do doing, Congress too recognized the special status of gas distribution utilities, imposing this obligation only on natural gas utilities and not other types of gas sellers. Pub.L. 95-617, 92 Stat. 3117 (1978).

on their ability to advertise that non-regulated businesses are free to adopt or ignore.[10]

In light of these factors, it is hardly surprising that Ohio treats gas sales by regulated utilities differently for tax purposes than sales by either in-State or out-of-State marketing companies. In the words of Justice Brandeis in *Frost, supra*, "a franchise to operate a public utility is not like the general right to engage in a lawful business." Given the utility franchise obligation to provide affordable and reliable service to all customers at regulated prices and to implement a host of State and Federal environmental and social welfare policies, the special status of utilities continues to be a critical component of the Nation's economy, notwithstanding the industry restructuring activities now ongoing. While this case involves a system for the taxation of utility companies, a decision of this court which fails to recognize and preserve the regulatory status of utilities could erode the ability of States to exercise their police powers more broadly to regulate utilities in the public interest.

Given the disparate rights and obligations the State establishes for the utility companies it regulates, there is clearly

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[10] *See* NARUC COMPILATION at 562-3 (concerning extent of State commission implementation of conservation incentive programs for gas utilities), at 414-5 (concerning recovery of research and development and pollution abatement costs), and at 44 (concerning restrictions on recovery of advertising expenditures in utility rates). Under section 303 (b)(2) and (4) of PURPA, *supra*, Congress established a policy for State regulatory commissions to consider imposing such restrictions on advertising by gas utilities and funding conservation programs.

a rational basis for the distinctions Ohio has drawn. Accordingly, the decision of the Court below should be affirmed.

CONCLUSION

The judgment of the Supreme Court of Ohio should be affirmed.

Respectfully submitted,

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